

103

# INDIAN TRIBAL JUSTICE ACT

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Y 4. R 31/3:103-19

Indian Tribal Justice Act, Serial N... **ARING**

BEFORE THE  
SUBCOMMITTEE ON  
NATIVE AMERICAN AFFAIRS  
OF THE  
COMMITTEE ON  
NATURAL RESOURCES  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

**H.R. 1268**

TO ASSIST THE DEVELOPMENT OF TRIBAL JUDICIAL SYSTEMS, AND  
FOR OTHER PURPOSES

HEARING HELD IN WASHINGTON, DC  
APRIL 21, 1993

**Serial No. 103-19**

Printed for the use of the Committee on Natural Resources



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# H.R. 1268—THE INDIAN TRIBAL JUSTICE ACT

APRIL 21, 1993

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
COMMITTEE ON NATURAL RESOURCES,  
Washington, DC.

The subcommittee met at 1 p.m., in room 1324, Longworth House Office Building, the Honorable Bill Richardson presiding.

## OPENING STATEMENT OF CHAIRMAN RICHARDSON

Mr. RICHARDSON. The subcommittee will come to order. I would like to welcome everyone here today for the hearing on H.R. 1268, the Indian Tribal Justice Act.

A fundamental maxim of Indian law is that Indian Tribes retain any and all sovereignty that is not specifically divested by the Congress. Fundamental to the exercise of this sovereignty is the ability of Indian Tribes to administer justice on tribal lands. Our committee and the Congress has affirmed the rights of Indian Tribes to exercise jurisdiction over all Indians through the passage of legislation overturning *Duro vs. Reina*.

The United States clearly has a trust responsibility to ensure that tribal justice systems are properly funded and provided with the proper technical assistance. Tribes have shown for years that they are capable of operating successful justice systems on shoe-string budgets. Tribal justice systems must receive funding levels equal to the tremendous task with which they are charged—the dispensation of fair and equal justice in Indian country.

I am aware that last year, prior to the existence of this subcommittee, this legislation was a matter of controversy. The House and Senate committees had differing views on how to improve tribal courts. Indian Tribes were divided as to whether they wanted a national judicial conference or no judicial conference. H.R. 1268 strikes a compromise. It provides that if a Tribe chooses to join a conference, be it local, regional, or national, they are free to do so. If Tribes choose not to be part of any tribal judicial conference, they are free to do that.

I believe that the House and Senate bills are very similar and they allow Tribes to exercise their sovereign right to choose their own destinies in the area of tribal courts.

H.R. 1268, the Indian Tribal Justice Act, will provide badly needed resources to Indian Tribes to ensure that there is adequate funding for the administration of justice on tribal lands. At this time, I request the bill, background and section-by-section analysis be made part of the record.

[The bill, H.R. 1268, and background information follow:]



103D CONGRESS  
1ST SESSION

# H. R. 1268

To assist the development of tribal judicial systems, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 1993

Mr. RICHARDSON (for himself and Ms. ENGLISH of Arizona) introduced the following bill; which was referred to the Committee on Natural Resources

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## A BILL

To assist the development of tribal judicial systems, and  
for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Indian Tribal Justice  
5       Act”.

6       **SEC. 2. FINDINGS.**

7       The Congress finds and declares that--

8               (1) there is a government-to-government rela-  
9       tionship between the United States and each Indian  
10      tribe;

1           (2) Congress, through statutes, treaties, and  
2       the exercise of administrative authorities, has recog-  
3       nized the self-determination, self-reliance, and inher-  
4       ent sovereignty of Indian tribes;

5           (3) Indian tribes possess the inherent authority  
6       to establish their own form of government, including  
7       tribal justice systems;

8           (4) tribal justice systems are essential to self-  
9       government and integral to the fulfillment of the  
10      Federal Government's policy of self-determination;

11          (5) tribal justice systems are inadequately fund-  
12      ed and the lack of adequate funding impairs their  
13      ability to administer justice effectively; and

14          (6) tribal government involvement in and com-  
15      mitment to improving tribal justice systems is essen-  
16      tial to the accomplishment of the goals of this Act.

17 **SEC. 3. DEFINITIONS.**

18      For purposes of this Act:

19          (1) The term "Bureau" means the Bureau of  
20      Indian Affairs of the Department of the Interior.

21          (2) The term "Courts of Indian Offenses"  
22      means the courts established pursuant to part 11 of  
23      title 25, Code of Federal Regulations.

24          (3) The term "Indian tribe" means any Indian  
25      tribe, band, nation, pueblo, or other organized group

1 or community, including any Alaska Native entity,  
2 which administers justice under its inherent author-  
3 ity or the authority of the United States and which  
4 is recognized as eligible for the special programs and  
5 services provided by the United States to Indian  
6 tribes because of their status as Indians.

7 (4) The term “judicial personnel” means any  
8 judge, magistrate, court counselor, court clerk, court  
9 administrator, bailiff, probation officer, officer of the  
10 court, dispute resolution facilitator, or other official,  
11 employee, or volunteer within the tribal justice sys-  
12 tem.

13 (5) The term “Office” means the Office of  
14 Tribal Justice Support within the Bureau of Indian  
15 Affairs.

16 (6) The term “Secretary” means the Secretary  
17 of the Interior.

18 (7) The term “tribal organization” means any  
19 organization defined in section 4(l) of the Indian  
20 Self-Determination and Education Assistance Act.

21 (8) The term “tribal justice system” means the  
22 entire judicial branch, and employees thereof, of an  
23 Indian tribe, including but not limited to traditional  
24 methods and forums for dispute resolution, lower  
25 courts, appellate courts, alternative dispute resolu-

1 tion systems, and circuit rider systems, established  
2 by inherent tribal authority whether or not they con-  
3 stitute a court of record.

## 4 **TITLE I—TRIBAL JUSTICE** 5 **SYSTEMS**

### 6 **SEC. 101. OFFICE OF TRIBAL JUSTICE SUPPORT.**

7 (a) **ESTABLISHMENT.**—There is hereby established  
8 within the Bureau the Office of Tribal Justice Support.  
9 The purpose of the Office shall be to further the develop-  
10 ment, operation, and enhancement of tribal justice sys-  
11 tems and Courts of Indian Offenses.

12 (b) **TRANSFER OF EXISTING FUNCTIONS AND PER-**  
13 **SONNEL.**—All functions performed before the date of the  
14 enactment of this Act by the Branch of Judicial Services  
15 of the Bureau and all personnel assigned to such Branch  
16 as of the date of the enactment of this Act are hereby  
17 transferred to the Office of Tribal Justice Support. Any  
18 reference in any law, regulation, executive order, reorga-  
19 nization plan, or delegation of authority to the Branch of  
20 Judicial Services is deemed to be a reference to the Office  
21 of Tribal Justice Support.

22 (c) **FUNCTIONS.**—Except as otherwise provided in  
23 title II, in addition to the functions transferred to the Of-  
24 fice pursuant to subsection (b), the Office shall perform  
25 the following functions:

(1) Develop and conduct programs of continuing education and training for personnel of tribal judicial systems and Courts of Indian Offenses.

(2) Provide funds to Indian tribes and tribal organizations for the development, enhancement, and continuing operation of tribal justice systems.

(3) Provide technical assistance and training to Indian tribes and tribal organizations upon request.

(4) Study and conduct research concerning the operation of tribal justice systems.

(5) Promote cooperation and coordination between tribal justice systems, the Federal judiciary, and State judiciary systems.

(6) Oversee the continuing operations of the Courts of Indian Offenses.

(d) NO IMPOSITION OF STANDARDS.—Nothing in this section shall be deemed or construed to authorize the Office to impose justice standards on Indian tribes.

(e) ASSISTANCE TO TRIBES.—(1) The Office shall provide training and technical assistance to any Indian tribe or tribal organization upon request. Technical assistance and training which may be provided by the Office shall include, but is not limited to, assistance for the development of—

(A) tribal codes and rules of procedure;

- 1 (B) tribal court administrative procedures and  
2 court records management systems;  
3 (C) methods of reducing case delays;  
4 (D) methods of alternative dispute resolution;  
5 (E) tribal standards for judicial administration  
6 and conduct; and  
7 (F) long-range plans for the enhancement of  
8 tribal justice systems.

9 (2) Technical assistance and training provided pursu-  
10 ant to paragraph (1) may be provided through direct serv-  
11 ices, by contract with independent entities, or through  
12 grants to Indian tribes or tribal organizations.

13 (f) INFORMATION CLEARINGHOUSE ON TRIBAL JUS-  
14 TICE SYSTEMS.—The Office shall establish an information  
15 clearinghouse (which shall include an electronic data base)  
16 on tribal justice systems and Courts of Indian Offenses  
17 including, but not limited to, information on tribal judicial  
18 personnel, funding, model tribal codes, tribal justice activi-  
19 ties, and tribal judicial decisions.

20 **SEC. 102. SURVEY OF TRIBAL JUDICIAL SYSTEMS.**

21 (a) IN GENERAL.—Not later than one year after the  
22 date of the enactment of this Act, the Office shall conduct  
23 a survey of conditions of tribal justice systems and Courts  
24 of Indian Offenses to determine the resources and funding  
25 needed to provide for expeditious and effective administra-

1 tion of justice. The Office shall annually update the infor-  
2 mation and findings contained in the survey required  
3 under this section.

4 (b) LOCAL CONDITIONS.—In the course of any an-  
5 nual survey, the Office shall document local conditions on  
6 each reservation, including, but not limited to—

7 (1) the reservation size and population to be  
8 served;

9 (2) the levels of functioning and capacity of the  
10 tribal justice system;

11 (3) the volume and complexity of the case loads;

12 (4) the facilities, including detention facilities,  
13 and program resources available;

14 (5) funding levels and personnel staffing re-  
15 quirements for the tribal justice system;

16 (6) the experience and qualifications of judicial  
17 personnel of the tribal justice system; and

18 (7) the training and technical assistance needs  
19 of the tribal justice system.

20 (c) CONSULTATION WITH INDIAN TRIBES.—The Of-  
21 fice shall actively consult with Indian tribes and tribal or-  
22 ganizations in the development and conduct of the surveys  
23 under this section. Indian tribes and tribal organizations  
24 shall have the opportunity to review and make rec-  
25 ommendations regarding the findings of the survey prior



1 to final publication of the survey. After Indian tribes and  
2 tribal organizations have reviewed and commented on the  
3 results of the survey, the Office shall report its findings,  
4 together with the comments and recommendations of the  
5 Indian tribes and tribal organizations, to the Secretary,  
6 the Select Committee on Indian Affairs of the Senate, and  
7 the Subcommittee on Native American Affairs of the Com-  
8 mittee on Natural Resources of the House of Representa-  
9 tives.

10 **SEC. 103. BASE SUPPORT FUNDING FOR TRIBAL JUSTICE**  
11 **SYSTEMS.**

12 (a) IN GENERAL.—Pursuant to the Indian Self-De-  
13 termination and Education Assistance Act, the Secretary  
14 is authorized (to the extent provided in advance in appro-  
15 priations Acts) to enter into contracts, grants, or agree-  
16 ments with Indian tribes and tribal organizations for the  
17 development, enhancement, and continuing operation of  
18 tribal justice systems on Indian reservations.

19 (b) PURPOSES FOR WHICH FINANCIAL ASSISTANCE  
20 MAY BE USED.—Financial assistance provided through  
21 contracts, grants, or agreements entered into pursuant to  
22 this section may be used for—

23 (1) planning for the development, enhancement,  
24 and operation of tribal justice systems;

25 (2) the employment of judicial personnel;



1           (3) training programs and continuing education  
2       for tribal judicial personnel;

3           (4) the acquisition, development, and mainte-  
4       nance of a law library or computer assisted legal re-  
5       search capacities;

6           (5) the development, revision, and publication  
7       of tribal codes, rules of practice, rules of procedure,  
8       and standards of judicial performance and conduct;

9           (6) the development and operation of records  
10      management systems;

11          (7) the construction or renovation of facilities  
12      for tribal justice systems;

13          (8) membership and related expenses for par-  
14      ticipation in national and regional organizations of  
15      tribal justice systems and other professional organi-  
16      zations; and

17          (9) the development and operation of other in-  
18      novative and culturally relevant programs and  
19      projects, including programs and projects for—

20              (A) alternative dispute resolution;

21              (B) tribal victims assistance or victims  
22      services;

23              (C) tribal probation services or diversion  
24      programs;

1 (D) multidisciplinary investigations of child  
2 abuse; and

3 (E) tribal traditional justice systems or  
4 traditional methods of dispute resolution.

5 (c) FORMULA.—(1) Not later than 180 days after the  
6 date of the enactment of this Act, the Secretary, with the  
7 full participation of Indian tribes, shall establish and pro-  
8 mulgate by regulation, a formula which establishes base  
9 support funding for tribal justice systems in carrying out  
10 this section and tribal judicial conferences carrying out  
11 section 201(a)(2) on behalf of members of such con-  
12 ferences. Such formula shall assure that in any case in  
13 which two or more Indian tribes form a tribal judicial con-  
14 ference under title II, the base support for such conference  
15 shall be an amount equal to the aggregate of that which  
16 each tribal member of such conference would have received  
17 if such tribe had not elected to be a member of the con-  
18 ference.

19 (2) The Secretary shall develop appropriate case load  
20 standards and staffing requirements for tribal justice sys-  
21 tems that take into account unique reservation conditions.  
22 In the development of these standards, the Secretary shall  
23 work cooperatively with Indian tribes and tribal organiza-  
24 tions and shall refer to comparable relevant standards de-  
25 veloped by the Judicial Conference of the United States,

1 the National Center for State Courts, and the American  
2 Bar Association.

3 (3) Factors to be considered in the development of  
4 the base support funding formula shall include, but are  
5 not limited to—

6 (A) the case load standards and staffing re-  
7 quirements developed under paragraph (2);

8 (B) the reservation size and population to be  
9 served;

10 (C) the volume and complexity of the case  
11 loads;

12 (D) the projected number of cases per month;

13 (E) the projected number of persons receiving  
14 probation services or participating in diversion pro-  
15 grams; and

16 (F) any special circumstances warranting addi-  
17 tional financial assistance.

18 (4) In developing the formula for base support fund-  
19 ing for the tribal judicial systems and tribal judicial con-  
20 ferences under this section, the Secretary shall ensure eq-  
21 uitable distribution of funds.

1       **TITLE II—TRIBAL JUDICIAL**  
2                   **CONFERENCES**

3   **SEC. 201. ESTABLISHMENT; FUNDING.**

4       (a) **ESTABLISHMENT.**—In any case in which two or  
5 more governing bodies of Indian tribes establish a judicial  
6 conference, such conference shall be considered a tribal or-  
7 ganization and eligible to contract for funds pursuant to  
8 this title if each member tribe served by the conference  
9 has adopted a tribal resolution which authorizes the tribal  
10 judicial conference to receive and administer funds under  
11 this title. At the written request of any tribal judicial con-  
12 ference, a contract entered into pursuant to this title  
13 shall—

14           (1) authorize the conference to receive funds  
15 and only perform some or all of the duties of the  
16 Bureau and the Office under sections 101 and 102  
17 on behalf of the members of such conference; and

18           (2) authorize the conference to receive funds  
19 and only perform some or all of the duties of the  
20 Bureau and the Office under section 103 on behalf  
21 of members of the conference.

22       (b) **CONTRACT AUTHORITY.**—Pursuant to the Indian  
23 Self-Determination and Education Assistance Act, the  
24 Secretary is authorized to enter into contracts, grants, or  
25 agreements with a tribal judicial conference for the devel-

1 opment, enhancement, and continuing operation of tribal  
 2 justice systems of Indian tribes which are members of  
 3 such conference.

4 (c) FUNDING.—The Secretary is authorized to pro-  
 5 vide funding to tribal judicial conferences pursuant to con-  
 6 tracts entered into under the authority of the Indian Self-  
 7 Determination and Education Assistance Act for adminis-  
 8 trative expenses incurred by such conferences.

9 **SEC. 202. LIMITATION.**

10 In any case in which an Indian tribe receives financial  
 11 assistance through a tribal judicial conference for the op-  
 12 eration of a tribal justice system for any fiscal year, the  
 13 tribal justice system of that tribe shall not be eligible for  
 14 assistance under title I for that fiscal year.

15 **TITLE III—AUTHORIZATIONS**

16 **SEC. 301. TRIBAL JUSTICE SYSTEMS.**

17 (a) OFFICE.—There are authorized to be appro-  
 18 priated to carry out the provisions of sections 101, 102,  
 19 and 201(a)(1) of this Act, \$7,000,000 for each of the fis-  
 20 cal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000.  
 21 None of the funds provided under this subsection may be  
 22 used for the administrative expenses of the Office or any  
 23 tribal judicial conference.

24 (b) BASE SUPPORT FUNDING FOR TRIBAL JUSTICE  
 25 SYSTEMS AND JUDICIAL CONFERENCES.—There are au-

1 thorized to be appropriated to carry out the provisions of  
2 sections 103 and 201(a)(2) of this Act, \$50,000,000 for  
3 each of the fiscal years 1994, 1995, 1996, 1997, 1998,  
4 1999, and 2000.

5 (c) ADMINISTRATIVE EXPENSES FOR OFFICE.—

6 There are authorized to be appropriated, for the adminis-  
7 trative expenses of the Office, \$500,000 for each of the  
8 fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and  
9 2000.

10 (d) ADMINISTRATIVE EXPENSES FOR TRIBAL JUDI-

11 CIAL CONFERENCES.—There are authorized to be appro-  
12 priated, for the administrative expenses of tribal judicial  
13 conferences, \$500,000 for each of the fiscal years 1994,  
14 1995, 1996, 1997, 1998, 1999, and 2000.

15 (e) INDIAN PRIORITY SYSTEM.—Funds appropriated

16 pursuant to the authorizations provided by this section  
17 and available to a tribal judicial conference shall not be  
18 subject to the Indian priority system.

19 (f) ALLOCATION OF FUNDS.—In allocating funds ap-

20 propriated pursuant to the authorization contained in sub-  
21 section (a) among the Bureau, Office, and tribal judicial  
22 conferences, the Secretary shall take such actions as may  
23 be necessary to ensure that such allocation is carried out  
24 in a manner that is fair and equitable to tribal justice sys-  
25 tems and judicial conferences.

**BACKGROUND FOR APRIL 21ST HEARING ON  
H.R. 1268, THE INDIAN TRIBAL JUSTICE ACT**

Over the last three Congresses, the House Committee on Natural Resources has considered legislation to enhance the administration of justice in Indian country and provide resources to tribal justice systems. In the 100th Congress, the U.S. Commission on Civil Rights conducted several hearings on tribal justice systems. In the 101st Congress, several issues involving tribal courts emerged during the debate on overturning the case of Duro v. Reina. Tribal court legislation was introduced on both the Senate and House sides in the 102nd Congress, but a disagreement on several fundamental issues resulted in gridlock.

The Senate bill would have established a tribally chartered entity, Tribal Judicial Conference, outside the Bureau of Indian Affairs that would mandate funding formulas to the Bureau of Indian Affairs. the Justice Department stated that this was unconstitutional under the Appointments Clause since the Tribal Judicial Conference would be making significant decisions for the Executive Branch but the Conference was not appointed by the President or his designee. Second, the Senate bill proposed to amend the floor procedures of the House of Representatives for the Congressional ratification of the Tribal Judicial Conference. this provision would have caused a referral to the House Rules Committee. Third, the Senate bill mandated that the appropriation authority for tribal courts was to be transferred from the Appropriations Subcommittee on Interior and Related Agencies to the Subcommittee on Commerce, State and Judiciary. This provision would have created more jurisdictional problems on the House side.

Although there has been a great deal of attention placed on tribal justice systems, there has not been a corresponding increase in the level of funding. Funding for tribal justice systems is designed to support the personnel and administrative costs for the operation of 133 tribal courts and 22 Courts of Indian Offenses. The operation of a tribal justice system includes the need for probation services, child counselors, and the development of legal research capacities. In addition, the Branch of Judicial Services in the Bureau of Indian Affairs provides support, training and technical assistance to tribal courts. These reductions are made in the face of increasing numbers of tribal court cases as well as the increasing numbers of Indian tribes establishing tribal courts. Finally, the funding made available to Indian tribes for their judicial systems is not based on need but rather the funds are made available based on historic funding levels.

**THE INDIAN TRIBAL JUSTICE ACT**

The Indian Tribal Justice Act builds upon the previous drafts of tribal court legislation to reflect the concerns and views of tribal court judges and tribal leaders. This bill will allow tribally created judicial conferences to enter into Indian Self-Determination contracts for BIA functions regarding tribal justice systems. It will allow several judicial conferences to form and to work within the existing system. It also allows Indian tribes who choose not to join a judicial conference to remain independent. The Committee included this provision based on the testimony provided to the Committee in the last Congress which



indicated a strong preference for having a tribally chartered and organized judicial conference. The bill establishes an Office of Tribal Justice Support within the Bureau of Indian Affairs to further the development and enhancement of tribal justice systems. The Office will assume the functions and personnel of the Branch of Judicial Services within the Bureau of Indian Affairs. The Office of Tribal Justice Support shall be responsible for providing funds for the development, enhancement, and continuing operation of tribal justice systems, for providing training and technical assistance to tribal justice systems and to conduct research and study the operation of tribal justice systems. In addition, the bill would require the Office to provide training and technical assistance to any Indian tribe upon request. The Office will establish an information clearinghouse on tribal justice systems which shall include information on tribal court personnel, funding, tribal codes, and court decisions.

The Office is authorized to make a survey of the conditions of tribal justice systems to determine resources needed to provide for expeditious and effective administration of justice. The Office shall consult with Indian tribes in the development of the survey and Indian tribes shall review and make recommendations regarding the findings of the survey prior to final publication of the survey. The Office shall report its findings to the Secretary and the Senate Select Committee on Indian Affairs and the House Subcommittee on Native American Affairs.

The Indian Tribal Justice Act provides for base support funding to tribal judicial systems which would be based on objective criteria. The bill requires the Secretary to ensure equitable distribution of the funds. It would also require the Secretary with the full participation of Indian tribes to develop a funding formula which considers funding needs based on objective criteria.

Finally, the Indian Tribal Justice Act authorizes \$7,000,000 to be appropriated for fiscal years 1994 through 2000 for the operations of the Office of Tribal Justice Support. It authorizes \$50,000,000 for fiscal years 1994 through 2000 to provide base support funding to tribal justice systems. Finally, it provides \$500,000 for fiscal years 1994 through 2000 for the administrative expenses of tribal judicial conferences.



March 1, 1993

## **SECTION BY SECTION SUMMARY ANALYSIS OF THE INDIAN TRIBAL JUSTICE ACT**

### **SECTION 1**

Section 1 cites the short title of the Act as the "Indian Tribal Justice Act."

### **SECTION 2**

Section 2 sets out the findings of the Congress.

### **SECTION 3**

Section 3 of this bill sets out the definitions used in the Act.

## **TITLE I -- TRIBAL JUSTICE SYSTEMS**

### **SECTION 101**

Section 101 establishes an Office of Tribal Justice Support within the Bureau of Indian Affairs to further the development and enhancement of tribal justice systems. The Office of Tribal Justice Support shall be responsible for providing funds for the development, enhancement, and continuing operation of tribal judicial systems, for providing training and technical assistance to tribal justice systems and to conduct research and study the operation of tribal justice systems. In addition, this section requires the Office to provide staff, research, and planning assistance to Indian tribes. It would further require the Office to provide training and technical assistance to any Indian tribe upon request. It further requires the Office to establish an information clearinghouse on tribal justice systems which shall include information on tribal court personnel, funding, tribal codes, and court decisions.

### **SECTION 102**

Section 102 provides that the Office shall make a survey of the conditions of tribal justice systems to determine resources needed to provide for expeditious and effective administration of justice. The Office shall consult with Indian tribes in the development of the survey and Indian tribes shall review and make recommendations regarding the findings of the survey prior to final publication of the survey. In the course of any annual survey the Office shall document local conditions on each reservation including reservation size and service population, volume and complexity of caseloads, available facilities and program resources, and the training and technical assistance needs of the tribal justice system. The Office shall report its findings to the Secretary, the Senate Committee on Indian Affairs and

the House Subcommittee on Native American Affairs of the Committee on Natural Resources.

### **SECTION 103**

Section 103 provides that the Secretary is authorized to enter into agreements or contracts to provide financial assistance to any Indian tribe for the development, enhancement, or continuing operation of a tribal justice system pursuant to the Indian Self-Determination Act. This section provides that funds may be used for employment of justice personnel, training programs, development of law libraries, development of rules of practice and court procedure and other innovative and culturally relevant projects.

Finally, this section provides that the Secretary, with the participation of Indian tribes, shall promulgate regulations a base support funding formula for tribal justice systems. In developing the formula the Secretary shall consult with and receive the recommendations of Indian tribes. It further provides that the Secretary shall develop appropriate caseload standards and staffing requirements for tribal justice systems. In developing these standards the Secretary shall work cooperatively with the Indian tribes. Factors to be considered in the development of the formula shall include the reservation size, service population, and the volume and complexity of the caseload.

## **TITLE II -- TRIBAL JUDICIAL CONFERENCES**

### **SECTION 201**

Section 201 authorizes the Secretary enter into contracts with tribal judicial conferences pursuant to the Indian Self-Determination Act. Member tribes shall adopt tribal resolutions authorizing tribal judicial conferences to receive and administer funds provided under section 103 of this Act for the operation and maintenance of tribal justice systems. A tribal judicial conference may be authorized to perform any or all of the duties of the Office of Tribal Justice and the Bureau of Indian Affairs under sections 101, 102, and 103 of this Act on behalf of the members of the Conference.

### **SECTION 202**

Section 202 provides that where an Indian tribe receives financial assistance through a tribal judicial conference for the operation of a tribal justice system for any fiscal year, the tribal justice system of that tribe shall not be eligible for assistance under title I of this Act for that fiscal year.

**TITLE III -- AUTHORIZATIONS****SECTION 301**

Section 301 provides that \$7,000,000 shall be authorized for each of the fiscal years 1994 through 2000 to carry out the provisions of sections 101, 102 and 201(a)(1) of this Act. None of the funds provided under subsection (a) may be used for the administrative expenses of the Office or any tribal judicial conference. Subsection (b) provides that \$50,000,000 shall be authorized for each of the fiscal years 1994 through 2000 to carry out the provisions of sections 103 and 201(a)(2) of this Act. Subsection (c) provides that \$500,000 shall be authorized for each of the fiscal years 1994 through 2000 for the administrative expenses of the Office. Subsection (d) provides that \$500,000 shall be authorized for each of the fiscal years 1994 through 2000 for the administrative expenses of tribal judicial conferences. Subsection (e) provides that funds appropriated for tribal judicial conferences under this section shall not be subject to the Indian priority system. Subsection (f) requires the Secretary to take such actions as may be necessary to ensure that the allocation of funds is carried out in a manner that is fair and equitable to tribal justice systems and judicial conferences.

Mr. RICHARDSON. Again, I appreciate all of your thoughtful testimony and look forward to working with you on these important issues.

Let me again remind each witness that their full statements will be made part of the record, and I would ask them to please summarize their statements within five minutes.

Before we call the witnesses, I would like to recognize the distinguished ranking member, Mr. Thomas.

#### STATEMENT OF HON. CRAIG THOMAS

Mr. THOMAS. Thank you, Mr. Chairman. I will summarize as well and submit my statement for the record.

First let me recognize Mr. Gover, representing the Shoshone Business Council. Glad to have you here today.

It is clear that, of course, there is a need for an increase in both financial and technical support afforded to the tribal justice system. Many of these systems are woefully underfunded, and as a result, understaffed, and then as a result of that, of course, severely limited in their ability to meet the needs of justice for the Tribes.

The bill also seeks to address the concerns raised by many Tribes that a federally created tribal judicial conference, as envisioned in the Senate bill as introduced in the last Congress, would intrude on tribal sovereignty.

I am in support of the bill, but I am concerned about some of the funding levels that it provides. I feel strongly that any substantial funding should await the outcome of the survey of the tribal judicial systems provided in section 102. Only armed with the detailed information about the true level of tribal needs provided by such a survey can we make a reasoned and accurate assessment of the kind and the amount of funding necessary.

I am also troubled by the amount authorized to be appropriated in section 301[d] of the bill. Since the vast majority of the Tribes prefer to deal with the issue of whether to create a tribal judicial conference themselves, without any interference from the Federal Government, it seems logical that we should remove ourselves from the process entirely, including the monetary component.

So, I look forward to hearing the witnesses, and it would be helpful if, as you comment on it, you might address these points in your testimony.

Thank you, Mr. Chairman, for holding this hearing.

[Prepared statement of Mr. Thomas follows:]

#### OPENING STATEMENT OF HON. CRAIG THOMAS OF WYOMING

Thank you, Mr. Chairman. It is clear that there is a real need for an increase in both the financial and technical support afforded to Indian tribal justice systems. Most tribal justice systems are woefully underfunded and as a result, understaffed. As a result, their ability to adequately serve the needs of the tribes and to uphold justice is undermined. Caseloads increase, backlogs develop, and enforcement of tribal laws and regulations lags.

As an example, the 1991 report of the United States Commission on Civil Rights noted that inadequate funding seriously compromises the tribes' ability to comply with the Indian Civil Rights Act—the law guaranteeing to Indian residents of the reservations the same vital rights guaranteed to us by the Constitution. This bill increases both funding and support for tribal justice systems to alleviate these problems.

The bill also seeks to address the concerns raised by many tribes that a federally-created tribal judicial conference, as envisioned in the Senate bill as introduced last

Congress, could intrude upon tribal sovereignty by imposing non-Indian concepts of justice on the tribes. The authority of each tribal court comes directly from the inherent sovereign power of each individual Indian tribe. While tribal justice systems are essential to the proper execution and enforcement of tribal laws, each tribe must determine for itself the structure and authority of its system. In eliminating a federally-created tribal judicial conference and its attendant offices included in last year's legislation, the bill avoids possible encroachment on the tribes' rights. Instead, the tribes are free, if they wish, to form their own conference or similar entity.

In addition, it is important to note that the bill this Congress is more sensitive to those tribes with traditional, non-Anglo-American justice systems. Many tribes—such as the Pueblos of New Mexico and the Navajo—have justice systems based on traditional formats of dispute resolution. The language of the bill reflects the Subcommittee's desire that these historic forms retain equal footing with the newer, non-traditional systems.

However, while I support the overall objectives of the bill, I do have some serious concerns with the amount of funding levels it provides. I feel very strongly that any substantial funding should await the outcome of the survey of tribal judicial systems provided for by Section 102. Only armed with the detailed information about the true level of tribal needs provided by such a survey can we make a reasoned and accurate assessment of the kind and amount of funding necessary.

I am also troubled by the amount authorized to be appropriated in section 301(d) of the bill. Since the vast majority of the tribes prefer to deal with the issue of whether to create a tribal judicial conference themselves, without any interference from the federal government, it seems logical that we remove ourselves from the process entirely, including any monetary component. Should the tribes choose to form a conference, then it should also fall to them to finance its operations. Consequently, I believe that these funds, if appropriated at all, would be better spent at the grassroots level to improve the day-to-day functioning of tribal courts, rather than on the support of yet another bureaucracy.

It would be helpful to me if the witnesses could address these points in their testimony.

Thank you.

Mr. RICHARDSON. I thank my colleague.

The Chair recognizes the gentleman from American Samoa.

Mr. FALEOMAVEGA. Thank you, Mr. Chairman. I don't have an opening statement, but I certainly want to commend you and our ranking minority member of the subcommittee for holding this hearing and considering this bill that is now pending before our committee.

I appreciate your initiative and the leadership that you have displayed on bringing Indian issues to the forefront, and hopefully, we will resolve some of these fundamental problems that Indian Tribes across America have had over the years. I appreciate the opportunity of being here.

**PANEL CONSISTING OF HON. MARK MERCIER, TRIBAL COUNCIL CHAIRMAN, CONFEDERATED TRIBES OF THE GRANDE RONDE COMMUNITY OF OREGON: HON. DELFORD LESLIE, SENIOR ASSOCIATE JUDGE, HOPI TRIBE, KYKOTSMOVI, AZ: HON. JOHN HERRERA, CHIEF JUSTICE, LEECH LAKE RESERVATION TRIBAL COURT, CASS LAKE, MN: AND KEVIN GOVER, ESQ., ON BEHALF OF THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER INDIAN RESERVATION, FORT WASHAKIE, WY**

Mr. RICHARDSON. I thank the gentleman.

The Chair would like to ask the first panel, the Honorable Mark Mercier, Chairman, Confederated Tribe of the Grande Ronde Tribal Council, Grande Ronde, Oregon, to step up to the microphone; the Honorable Chief Judge of the Hopi Tribe, Delford Leslie; the Honorable John Herrera, chief justice, Leech Lake Tribal Court from



Cass Lake, Minnesota; and Kevin Gover on behalf of the Shoshone Business Council, Fort Washakie, Wyoming. I know my good friend from Wyoming welcomed Mr. Gover, who represents one of his constituencies, and I would like to mention that Mr. Gover is my constituent from New Mexico. So a double welcome to Mr. Gover.

I would like to again stress we are operating under the five-minute rule, and I would ask the Honorable Mark Mercier to please proceed. Thank you very much, Mr. Chairman.

#### STATEMENT OF HON. MARK MERCIER

Mr. MERCIER. Mr. Chairman, my name is Mark Mercier. I am the tribal council chairman for the Confederated Tribes of the Grande Ronde community in Oregon. It is an honor to testify to this subcommittee supporting H.R. 1268, the Indian Tribal Justice Act. For our Tribe, this bill comes at an appropriate time. We were terminated in 1954 and restored to Federal recognition in 1983. Today we are in the process of establishing a residential homeland, accumulating acreage in our community, and have already started the phased construction of a administrative building, much needed housing, and sites for economic development where we reside.

As a restored Tribe, we are very aware of our sovereignty and our Government-to-Government relationship with the United States. We seek to preserve and strengthen them. A duly authorized, functioning tribal court is an essential element to sovereignty. We have established our court because we are a Government and are actively fulfilling all of its duties associated with it. Currently, our tribal court isn't big. We have a judge who also serves other Reservations, who presides over our tribal court two days a month. But we are making our court as professionally and fully functioning as possible. No doubt our court's responsibilities will expand as our homelands develop and our members take up residency there. Yet even today our tribal court is struggling against limited resources. That is why this bill is so vital to us.

Mr. Chairman, this bill provides technical assistance to tribal courts while honoring the individual rights of each tribe and upholding the Government-to-Government relationship we all enjoy. We believe it is a marked improvement over the Senate tribal courts legislation of last Congress.

We also support the establishment of an office of tribal justice systems within the Bureau of Indian Affairs. The BIA is the lead Federal agency charged with and experienced in carrying out Federal trust and treaty obligations to all Tribes. It principally represents the Federal side of the Government-to-Government relationship we all enjoy. Its structure and functions are generally known to the Tribes, and its programs are subject to 638 contracting. The BIA and Interior Department have formal, established appeals procedures, if disputes arise. And as a Federal agency it has enforceable impartiality standards.

The new, untested, and unfamiliar national tribal judicial conference proposed during last Congress had none of these advantages or safeguards. Having experienced termination, we are not so cavalier in shifting our programs and responsibilities away from the BIA.

Our Tribe realizes that the BIA has problems with administering some of its programs. However, we feel that working with them, and with the guidance of this legislation, these problems can be resolved. To us, the piecemeal dismantling of the trustee appears to be piecemeal termination bit by bit. It is our feeling that taking a particular program and labeling it as a problem away from the Bureau and establishing a totally separate entity produces no guarantee whatsoever that this program will be better off or better administered.

We strongly support title II because it allows Tribes to voluntarily establish, join, and be served by tribal judicial conferences of their own choice. Under last Congress's Senate bill, our Tribes would have been forced to participate in a national tribal judicial conference if we wanted our interests represented for training and technical assistance and the development of the base formula. But we feel that our legal relationship is with the Federal Government and not some unknown organization. Why should they be given control over the Federal Government's obligations to our Tribe?

Under Congress last Senate bill, the national tribal judicial conference would have automatically been established on a first-come, first-served basis. It would have been granted a permanent monopoly over the distribution over all tribal courts' funding, and its provisions to challenge the recognition of such a conference were questionable and incredibly complicated.

This bill is vastly superior to those provisions. It has our long-standing support. We do, however, have a few relatively minor suggestions for amendments, which are included in our written statement.

So, our thanks to you on behalf of our Tribe for introducing H.R. 1268, and we think it is a very good and necessary bill and urge you to stick by its basic provisions. I appreciate the opportunity to testify today. Thank you.

[Prepared statement of Mr. Mercier follows:]

THE CONFEDERATED TRIBES  
OF THE GRAND RONDE COMMUNITY  
OF OREGON



TRIBAL COUNCIL  
TESTIMONY OF

MARK MERCIER, TRIBAL COUNCIL CHAIRMAN,  
THE CONFEDERATED TRIBES OF THE GRAND RONDE  
COMMUNITY OF OREGON,

to  
THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
COMMITTEE ON NATURAL RESOURCES,  
U.S. HOUSE OF REPRESENTATIVES,  
regarding  
H.R. 1268, THE INDIAN TRIBAL JUSTICE ACT  
APRIL 21, 1993

Mr. Chairman, my name is Mark Mercier. I am the Tribal Council Chairman, of the Confederated Tribes of the Grand Ronde Community of Oregon. It is an honor and pleasure to testify to this Subcommittee today in support of H.R. 1268, the Indian Tribal Justice Act.

GRAND RONDE BACKGROUND

For our tribe, this legislation comes at a very appropriate time. The Confederated Tribes of Grand Ronde were terminated in 1954 and restored to Federal Recognition in 1983. We have received a new reservation, but it is all commercial timberland, unsuitable for habitation. However, the revenues generated from timber sales off our reservation enables the Tribe to purchase lands for a residential homeland. We are accumulating acreage in our local community and have already started the phased construction of community and administrative buildings.

As a restored tribe, we are keenly aware of our sovereignty and our government-to-government relationship with the U.S.. Having been stripped of recognition and federal relations for many years, we now guard and seek to foster their permanency. A duly authorized and functioning tribal court is an essential element of our sovereignty. We have established our court because we are a government, and are actively trying to fulfill all the proper roles and duties of a government.

UMPUA  
MOI AIA  
ROGUE RIVER  
KAIAPUA  
CHASTA

9615 GRAND RONDE RD  
GRAND RONDE, OREGON 97147  
(503) 879-5215



THE CONFEDERATED TRIBES  
OF THE GRAND RONDE COMMUNITY  
OF OREGON

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Our tribal court is not big. Our judge, who also serves other reservations, presides over the Grand Ronde Tribal Court two days a month, during which hears 5 cases, mostly dealing with child welfare, constitutional and civil rights. Yet even with such a modest agenda, we're trying to make our court as professional and fully functioning as possible. We have invested as much formal authority as we can in our court. We have a clerk, rules of procedure, rules of evidence, and plainly written forms for use by parties in court. This is an active and essential branch of our tribal government. Our court's responsibilities will expand as our homelands develop and our members take up residency on tribal lands. In not too many years, we anticipate our court handling a broad range of cases, involving divorce, land use, small claims and personnel issues. Yet even today, the Grand Ronde tribal court is struggling against limited resources. And that is why this legislation is so necessary.

REVIEW OF H.R. 1268

Mr. Chairman, the Confederated Tribes of the Grand Ronde Community of Oregon strongly support H. R. 1268. It provides support for tribal courts while honoring the individual rights of tribes and upholding the government-to-government relationship. Overall, H.R.1268 is a flexible bill that is a marked improvement over the Senate tribal courts legislation considered last Congress.

I should now like to review H.R. 1268 on a title-by-title basis.

We generally support sections 1(Short Title), 2 (Findings), and 3 (Definitions). We suggest that, in Section 3 "tribal judicial conference" be defined. We are uncertain just what such a conference is and what functions it can perform. Is it just an information sharing body, or can it actively provide training and technical support functions? Can it actually adjudicate cases, such as intertribal court systems? For instance, Sections 103 (a) and 202 (b) mention conferences as charged with "continuing operations" of tribal justice systems, suggesting that such conferences can have adjudicative powers. A definition would help clarify what tribal judicial conferences are. We also urge that a definition for such conferences exclude intertribal appellate courts. Intertribal appeals systems should be separate entities of the tribes that create them.

TITLE I

We wholeheartedly support the establishment of an Office of Tribal Justice Systems within the Bureau of Indian Affairs. A separate office will emphasize the courts program and consolidate its functions in a single location.

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We particularly endorse establishing an Office of Tribal Justice Systems within the Bureau of Indian Affairs, the lead federal agency charged with, and experienced in, carrying out federal trust and treaty obligations to tribes. The Bureau represents the federal side of the government-to-government relationship between each individual tribe and the United States. Its structure and functions are generally known to the tribes and its programs are subject to 638 contracting. The B.I.A. and the Interior Department have formal, established appeals procedures if disputes arise, and as a federal agency, it has enforceable impartiality standards.

The new, untested and unfamiliar national tribal judicial conference proposed during last Congress had none of these advantages and safeguards. Further, given that a B.I.A Office of Tribal Justice Systems could easily be accommodated within existing Bureau support mechanisms, and a new, independent national tribal judicial conference would have to be created out of whole cloth, and Office of Tribal Justice Systems would probably be a more efficient arrangement. BIA would have to maintain responsibility and administrative capability over Federal Courts of Indian Offenses any event.

Additionally, the appropriations path for an Office of Tribal Justice Systems is will established, and the appropriators are familiar with Indian programs. Obtaining funding from a different subcommittee, as proposed by the Senate last year, poses some concerns. In a subcommittee unfamiliar with Indian issues, funds for tribal courts could require reductions in some other established programs, generating resistance. Also in a subcommittee unfamiliar with indian issues, members might decide to attach some restrictions to the funding.

Finally, having come through termination, we are not so caviller about shifting programs and responsibilities away from the B.I.A. and Department of the Interior. In the government-to-government relationship, both parties must be kept strong. The piecemeal dismantling of the trustee smacks of piecemeal termination.

We do have a comment regarding Section 101 (e). That provision authorizing the Office to provide training and technical assistance to tribes should authorize a broader range of Section 101 (c) functions to be eligible for provision through contracts or grants. Emphasis should be on keeping the Office modestly sized and efficient by at least enabling more functions to be performed by outside parties.

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We support Section 102 authorizing surveys of tribal judicial systems, noting especially the provision for tribal consultation, review and comment. However, we suggest that the initial survey be given two years from enactment to be completed, and that updates be every two years, rather than annual. Two years gives a more realistic amount of time for the new Office to be established, develop, conduct and report on a survey. Also, annual updates of a comprehensive survey could lead to almost constant paper churning.

We support Section 103, authorizing base support funding for tribal court systems. Again, we reemphasize here the need that such a program be administered through the B.I.A., which must be impartial and has a formal appeals procedure. Last Congress's Senate bill had a very restrictive appeals procedure, requiring that any complaints first be considered by the national tribal judicial conference, and then appeals were only permitted on question of law and not equity.

We suggest the bill specify state when the distribution formula is to be periodically re-applied to tribes, say every two or three years, so that the formula distribution can reflect changes in tribal situations. We also suggest that, in Section 103 (c) (1), tribes participating in tribal judicial conferences be able to dedicate some portion, rather than all, of their base funding to the conference. This would give tribes and conferences greater flexibility, and would be in keeping with our suggestion along this line for Section 202. We also suggest in Section 103 (c) (4) that the Secretary assure equity in not only developing the base formula, but in administering it as well.

#### TITLE II

We support Title ii because it allows tribes to voluntarily establish, join and be served by tribal judicial conferences of their own choosing. Under last Congress's Senate bill, our tribe, which enjoys a direct relationship with the federal government, would have been forced to participate in a national tribal judicial conference if we wanted our interests represented in the award of training and technical assistance money and the development of the base formula. H.R. 1268 is a significant improvement.

Our only question is whether membership in a tribal judicial conference should require that all of a member tribes's base funding be distributed through the conference, as now provided by Sections 103 (c) and 202. What if a tribe is a member of two conferences, say a regional and a national conference? Which would administer the funds? Or what if a tribe wanted to be a member of a conference, but only wanted a limited role and desired to still receive most of its base support directly from the B.I.A.? Uncertainties such as these could impede the development of tribal judicial conferences.

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One possible means of correction could be that, in their resolution required to join conferences, tribes could indicate what portion of their base funding they want to pass through the conference.

As mentioned in our comments on H.R. 1268's definitions, we believe intertribal appeals courts should be separately distinguished from tribal judicial conferences. With the bill's current requirements that a tribe's base funding pass through the conference, if intertribal appeals courts are considered tribal judicial conferences, funding for tribal trial courts would be handed down through its appellate courts, which we believe is inappropriate.

The voluntary participation in tribal judicial conferences is among H.R. 1268's most important provisions. Contrary to the Senate legislation of last Congress, this bill does not subject tribal courts to a national tribal judicial conference that they may not want to participate in, but which would be making funding formula decisions that will affect the tribe. It does not confer quasi-automatic Federal recognition as the sole national tribal judicial conference upon the first group to file a letter claiming to be such a group with the United States Congress. It does not involve an extremely complex and questionable Congressional procedure to challenge a group making that claim. And it does not almost irrevocably vest in that one national tribal judicial conference all the funds and funds distribution authority for technical assistance services to tribal courts. We applaud H.R. 1268's recognition of tribal decision making, diversity, and the right and the ability to choose.

#### TITLE III

We support the levels of funding authorized in Title III. We also support the separation of base courts funding from the Indian Priority Systems, stabilizing court operations. Finally, we like the secretarial assurance of equitable allocation.

Mr. Chairman, we believe H.R. 1268 establishes a very flexible program of Tribal courts support while recognizing each individual Tribes's sovereignty. It maintains the integrity of the government-to-government relationship by establishing the tribal courts assistance program in the Bureau of Indian Affairs, but also provides of the development of tribal judicial conferences and their assumption of the Bureau's functions. We strongly support H.R. 1268, and while we recognize that some adjustments may be made to it, we urge that its basic features be retained.

Thank You.

Mr. RICHARDSON. Mr. Chief Justice Leslie, welcome. Please proceed.

**STATEMENT OF HON. DELFORD LESLIE**

Mr. LESLIE. Thank you very much. I apologize in behalf of the chairman of the Hopi Tribe for not being here today. He unexpectedly got tied up and will not be here this afternoon.

Mr. Chairman, my name is Delford Leslie. I am the senior associate judge for the Hopi Indian Tribe of Arizona. The following presentation is a prepared statement that we will submit to the committee. We appreciate very much the opportunity to appear before the subcommittee today to discuss the matter that is of great concern not only to the Hopi Tribe but to other Tribes throughout the United States.

The Hopi Tribe commends you, Chairman Richardson, and Representative Karan English from Arizona for taking the lead in seeing that the 103d Congress will develop legislation to provide much-needed additional funding for tribal courts.

In submitting written comments to H.R. 1268, we are also submitting specific recommendations with this testimony as Appendix No. A. We request that this be made part of the record of this hearing.

Mr. RICHARDSON. Without objection.

[Appendix No. A follows:]

## APPENDIX A

The Hopi Tribe's comments to specific provisions in the proposed bill are highlighted in bold type below. The Hopi Tribe hopes that these comments will prove useful to the Committee as it considers the bill.

H.R. 1268

SEC. 1 SHORT TITLE.

SEC. 2 FINDINGS.

The Congress finds and declares that --

(4) tribal justice systems are essential to self-government and integral to the fulfillment of the Federal Government's policy of self-determination;

**COMMENT:** Tribal justice systems are an essential element of self-government, and Tribes should be the ones determining what role they play in self-government and self-determination. As written, the language implies that the justice systems are these, not to fulfill the needs of the Tribes, but rather to fulfill some Federal Government policy need. Currently that policy is "self-determination" but if that policy were to change, the tribal justice systems would still be needed by the tribes because they are an important part of the inherent sovereignty of the tribes. Therefore, would suggest the following changes in the language:

(4) tribal justice systems are an essential part of tribal self-government; and

(5) tribal justice systems are inadequately funded and the lack of adequate funding impairs their ability to administer justice effectively; and

**COMMENT:** This language implies that tribal justice systems are currently ineffective in administering justice. However, in spite of inadequate funding may tribal justice systems are effectively "administering justice". Adequate funding will only assist in that role. Rather than focusing on the "administration of justice" there should be a focus on the



fact that there is a certain level of funding needed to operate any system. The language of the finding should be changed to address the operational funding needs as opposed to the findings as to the adequacy of the "justice" administered by the tribal justice systems. Therefore, the following change in language is suggested:

(5) tribal justice systems are inadequately funded and the lack of adequate funding impairs their operation; and

### SEC. 3 DEFINITIONS.

#### TITLE 1 - TRIBAL JUSTICE SYSTEMS

### SEC. 101 OFFICE OF TRIBAL JUSTICE SUPPORT.

(a) ESTABLISHMENT - There is hereby established within the bureau the office of Tribal Justice Support. The purpose of the Office shall be the further the development, operation, and enhancement of tribal justice systems and Courts of Indian offenses.

**COMMENT:** As now written, this section implies that the "Office", by itself, is being directed by Congress to "further the development, operation, and enhancement of tribal justice systems". In light of the clear federal policy of tribal self-determination and self-government, the purpose of the Office should be redefined to make it clear that it is not the Office, an agency of the Federal Government, who is to directly "further" tribal justice systems. Rather, the purpose of the Office should be to "assist" tribal governments address the development, operation and enhancement of their justice systems. Therefore, the following language is proposed for the section:

... The purpose of the Office shall be to assist Tribal governments in the development, operation, and enhancement of tribal justice systems and Courts of Indian Offenses.

(b) TRANSFER OF EXISTING FUNCTIONS AND PERSONNEL - All functions performed before the date of the enactment of this Act by the Branch of Judicial Services of the date of the enactment of this Act are hereby transferred to the Office of Tribal Justice Support. Any reference in any law, regulation, executive order, reorganization plan, or delegation of authority to the Branch of Judicial Services is deemed to be a reference to the Office of Tribal Justice Support.

**COMMENT:** This section transfers the BIA's existing Judicial Services staff to the new "Office". This could result in the Judicial Services merely changing their title to "Office" and continuing to do "business as usual" since there would be no new staff and as a unit they would be comfortable in continuing the procedures and policies that are already in place. It seems that one of the major points of this legislation would be lost, since many Tribes have expressed dissatisfaction with the way the existing Judicial Services Branch is dealing with the Tribal Governments and Courts.

Additionally, there is no mention of a corresponding transfer of existing Judicial Services operating funding to continue to pay for and support the staff. Under the language of the Act, the renamed Judicial Services would be operating under the appropriations set forth in this act. However, it is possible that they could lose their existing BIA funding yet they would be responsible for their old duties as well as the new duties spelled out in this legislation. This could doom the new Office before it even starts. One of the major reasons for Tribal interest in this legislation is the need to "enhance" Tribal Court Systems. It is difficult to see how this would be accomplished by merely renaming the old BIA office, giving it additional duties and not proving that its old funding would be retained and additional funding provided to hire staff and perform the additional duties.

Therefore, it is suggested that this section be rewritten to make it clear that not only will the existing Judicial Services staff be transferred to the Office, but that their existing budgets will also be transferred. Additionally, it should be made clear that the appropriations provided for in this Act will be in addition to the funds currently available for the Judicial Services responsibilities through the normal BIA budgeting process, i.e., the Judicial Services budget will not be offset by appropriations under this Act but will be transferred intact and continue to be available in the future to the Office.

(c) FUNCTIONS - Except as otherwise provided in title II, in addition to the functions transferred to the Office pursuant to subsection (b), the Office shall perform the following functions:

- (1) Develop and conduct programs of continuing education and training for personnel of tribal judicial systems and Courts of Indian Offenses.

**COMMENT:** This language seems to direct the Office to develop and conduct such continuing education and making it clear that such programs should be developed and conducted with Tribal input. The Office (BIA)

would continue to be in the drivers seat, directing the types and character of any continuing education and training. Given the Federal policy of Indian self-determination, it is important that this legislation make is clear that the Office will only develop and conduct such programs as are requested by the Tribes and that the programs reflect that policies and character of the Tribes. NOTE: Section 102 contains such a requirement but is expressly limited to Section 102 activities.

- (3) Provide technical assistance and training to Indian tribes and tribal organizations upon request.

**COMMENT:** This provision is superfluous as section (e) mandated the same thing. Recommend that this provision be deleted.

- (4) Study and conduct research concerning the operation of tribal justice systems.

**COMMENT:** Again this provision directs the Office to perform an action directed at tribal justice systems without providing for input from the Tribal governments. The concept of the federal government performing studies and doing research on Indian Tribes and Governments is inconsistent with the existing government-to-government relation of Tribes and the Federal government. Any studies of research of Tribal justice systems should only be done upon consultation with and agreement by the affected Tribal government. Given the results of some past studies of Indian Tribes, Tribal Governments have a real interest in knowing the ultimate purpose of any study, the entity doing the studying, and what the results of the study will be used for. Therefore, at the very least, this provision should provide for Tribal government concurrence in the study and the right to review the results prior to publication.

- (6) Oversee the continuing operations of the Courts of Indian Offenses.

(d) NO IMPOSITION OF STANDARDS - Nothing in this section shall be deemed or construed to authorize the Office to impose justice standards on Indian tribes.

**COMMENT:** This disclaimer is very narrow and only prohibits the imposition of "justice standards". However, there are other things that the Office could indirectly impose or forcefully encourage. Such as, influencing structure of tribal justice systems. Therefore, the legislation should have a broader disclaimer that addresses all of the issues, not just imposition of justice standards.

- (f) INFORMATION CLEARING HOUSE ON TRIBAL JUSTICE SYSTEMS - The Office

shall establish an information clearinghouse (which shall include an electronic data base) on tribal justice systems and Courts of Indian Offenses including, but not limited to, information of tribal judicial personnel, funding, model tribal codes, tribal justice activities, and tribal judicial decisions.

**COMMENT:** It is unclear from this provision whether or not participation in this "Clearing House" is mandatory for all Tribal justice systems. Additionally, this provision provides for the collecting of a broad range of information. Some of that information, such personnel information, could be assuring Tribes that such information will be kept confidential if the Tribe wishes. Therefore, the issues of participation should be made clear and the provision should provide that Tribes can request that information gathered by kept confidential.

#### SEC. 102 SURVEY OF TRIBAL JUDICIAL SYSTEMS

**COMMENT:** What is the purpose of the survey? It is not used or referred to anywhere in the Act. If it is to be used in developing the base level funding formula then that should be made clear.

In 1976 the American Indian Policy Review Commission reviewed tribal courts and recommended that adequate funding be provided to tribal courts. However, the recommendations were never followed. The Tribes do not need yet another survey or study performed unless that survey or study will result in some action.

Therefore, it is recommended that this section contain language that explains the purpose of the survey and the use to which the results are to be.

Additionally, this section provides for the "Office" to conduct the survey. This could result in a conflict of interest for the Office. The Office would, in essence, be commenting on the job it had done in the past as the Bureau Judicial Services Branch in assisting Tribes in the development of its justice systems. Therefore, it is recommended that the Secretary be given the responsibility to perform the survey and the Secretary be directed to use a non-BIA or Federal entity to perform the study.

(a) IN GENERAL. - Not later than one year after the date of the enactment of this Act, the Office shall conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses to determine the resources and funding needed to provide for expeditious and effective administration of justice. The Office shall annually update the information and findings contained in the survey required under this section.

**COMMENT:** The Standard used in this provision, "expeditious and effective administration of justice" is very broad. There is a possibility that the

federal government's definition, as set forth by the Office in its survey, would not match the Tribes definition. Tribal governments should receive sufficient funding to bring their court systems into line with similar state and federal court systems. There should not be a lower, "expeditious and effective" standard for Tribal courts. Therefore, it is recommended that the standard in this section be changed to so that resource and funding needs are determined based upon those necessary to bring Tribal courts up to, at a minimum, the level enjoyed by similarly situated state and federal courts.

(b) LOCAL CONDITIONS. - In the course of any annual survey, the Office shall document local conditions on each reservation, including, but not limited to -

- (1) the reservation size and population to be served;
- (2) the levels of functioning and capacity of the tribal justice systems;

**COMMENT:** This provision is unclear. Does it mean that the tribal justice systems will be evaluated to determine at what level it is functioning and what volume of cases it can handle? There is a danger here that any Office evaluation of the Tribal justice system would be result in the tribal justice systems being evaluated according to the same generic Anglo concept of a justice system. Tribal court systems, although sharing some characteristics, are unique to each Tribe. What a Tribe determines to be an adequate level of functioning for their court system may not coincide with the Office's view. Therefore, this provision should be rewritten to reflect exactly what "levels of functioning and capacity" mean and that it will be measured against the particular Tribe's concepts, not as determined by the Office.

- (3) the volume and complexity of the case loads;
- (4) the facilities, including detention facilities, and program resources available;

**COMMENT:** What is meant by "program resources?"

- (5) funding levels and personnel staffing requirements for the tribal justice system;
- (6) the experience and qualifications of judicial personnel of the tribal justice system; and

**COMMENT:** What is the point of this? Under the policy of Tribal self-

determination, the qualifications and experience of judicial personnel, including judges, should be a purely Tribal determination and concern. The Tribes should not be placed in a position of justifying their decisions as to the necessary qualifications and experience for judicial personnel to the Office (BIA). Therefore, it is recommended that this provision be deleted.

(7) the training and technical assistance needs of the tribal justice system.

#### SEC. 103. BASE SUPPORT FUNDING FOR TRIBAL JUSTICE SYSTEMS.

(a) IN GENERAL. - Pursuant to the Indian Self-Determination and Education Assistance Act, the Secretary is authorized (to the extent provided in advance in appropriations Acts) to enter into contracts, grants, or agreements with Indian tribes and tribal organizations for the development, enhancement, and continuing operation of tribal justice systems on Indian reservations.

**COMMENT:** The language in this provision appears to state that the Secretary can only enter into contracts and grants, etc. to the extent provided for in budget appropriated Acts. The extent to which the Secretary uses the appropriations for the purposes of this Act should not be controlled and subject to change each year during appropriations. The Secretary should be able to enter into contracts, grants and agreements for ALL of the monies appropriated. Therefore, it is recommended that the language "(to the extent provided in advance in appropriation acts)" be deleted.

(b) PURPOSES FOR WHICH FINANCIAL ASSISTANCE MAY BE USED. - Financial assistance provided through contracts, grants, or agreements entered into pursuant to this section may be used for;

(4) the acquisition, development, and maintenance of a law library or a computer assisted legal research capability but not both. However, both are needed. Therefore, to make it clear that Tribal courts can maintain a law library and also have access to computer aided research programs, the "or" should be changed to "and" or "and/or."

(6) the development and operation of records management systems;

**COMMENT:** This provision provides for the development and operation of the systems, does that include the purchase of the hardware to run the



**systems?**

(7) the construction or renovation of facilities for tribal justice systems;

(8) membership and related expenses for participation in national and regional organizations of tribal justice systems and other professional organizations; and

(9) the development and operation of other innovative and culturally relevant programs and projects, including programs and projects for -

(A) alternative dispute resolution;

(B) tribal victims assistance or victims services;

(C) tribal probation services or diversion programs;

(D) multidisciplinary investigations of child abuse;

and

(E) tribal traditional justice systems or traditional methods of dispute resolution.

**COMMENT:** This section lists other uses to which the funds can be put. However, it does not allow for the funds to be used for public defender services. When Congress passed the Indian Civil Rights Act the requirement to provide public defender services was left out because of the cost such services would be to the Tribes. However, one of the criticisms directed at many tribal court systems is the lack of public defender services for indigent defendants. There is a need for such services. Therefore, a provision should be added to the list to allow funds to be used for such services. The following language is suggested:

(F) tribal public defender services;

(c) FORMULA.

(4) In developing the formula for base support funding for the tribal judicial systems and tribal judicial conferences under this section, the Secretary shall ensure

equitable distribution of funds.

**COMMENT:** What happens if, as a result of the formula, a Tribe does not receive sufficient funds to support any court system? This section needs language to address that possibility. Therefore, language should be included to assure that all Tribal court systems will be funded a certain minimum level with the rest of the funds being disbursed according to the formula.

## TITLE II - TRIBAL JUDICIAL CONFERENCES

### SEC. 201 ESTABLISHMENT.

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### SEC. 202 LIMITATION

In any case in which an Indian tribe receives financial assistance through a tribal judicial conference for the operation of a tribal justice system for any fiscal year, the tribal justice system of that tribe shall not be eligible for assistance under title I for that fiscal year.

**COMMENT:** There is no provision that the funds available under this bill are in addition to the funds currently available under the BIA budgets for tribal courts. Also, all the functions of the BIA Judicial Services Branch are being transferred to the Office of Tribal Justice Support under Title I. Does this then mean that if a tribe participates in a judicial conference that their court system will be limited to receiving the funds appropriated under this Act? That seems inconsistent with the view that this Act should be providing additional funds, not in lieu of funds, for the enhancement of tribal justice systems. This problem should be addressed and resolved through language in this Act.

## TITLE III - AUTHORIZATIONS

### SEC. 301 TRIBAL JUSTICE SYSTEMS

(f) ALLOCATION OF FUNDS. - In allocating funds appropriated pursuant to the authorization contained in subsection (a) among the Bureau, Office, and tribal judicial conferences, the Secretary shall take such actions as may be necessary to ensure that such allocation is carried out in a manner that is fair and equitable to tribal justice systems

and judicial conferences.

**COMMENT:** All present functions and personnel of the Bureau Tribal Justice Branch have been shifted to the Office of Tribal Justice Support, so why should any agency in the Bureau besides the Office be getting funds under this Act? The word "Bureau" should be deleted, making it clear that all funds are to go to Tribal justice systems either through the Office or through Judicial Conferences.

Mr. LESLIE. Thank you.

The Hopi Tribe is very concerned about a number of provisions contained in the current bill, as introduced, and we have provided these comments and suggestions in the hope that they will prove helpful in improving H.R. 1268 to a point where we will be able to express our support for it. The Hopi Tribe is encouraged to see these issues raised early in Congress, and we strongly encourage the subcommittee to continue working to enact this legislation.

Quite honestly, we would have preferred to see legislation introduced that more closely resembled S. 1752, that emerged in the Senate during the last Congress. In withholding our support for H.R. 1268 today, the Hopi Tribe pledges to work with both houses of Congress to develop legislation that we can support without qualification.

As you review our specific comments on H.R. 1268, we will note that several of them deal with issues relating to sovereignty. That is because the Hopi Tribe feels very strongly that any legislation that directs a Federal agency to work with or study tribal governance or, in this case, tribal court systems, must continue to emphasize the Government-to-Government relationship between Tribes and the Federal Government. Thus, the legislation should specifically and expressly provide for tribal participation in all areas of any such studies.

Mr. Chairman, in many respects the issues relating to tribal court systems have been studied enough. What we need to see is action. The American Indian Policy Review Commission identified and discussed the needs for additional funding for tribal court systems in 1976, but very little was done. Fifteen years later, in 1991, the U.S. Commission on Civil Rights studied the issue again and reported a similar conclusion. H.R. 1268 proposes yet another review or a survey of tribal justice systems, but states no purpose for the survey or the intended use for its results.

If it is necessary that we endure yet another study, Mr. Chairman, we request that one point be made clear: That the U.S. Congress should mandate that the results of this study be used to ensure that tribal justice systems are adequately funded and brought to the level that is comparable with similarly situated State and Federal courts.

The Hopi Tribe is particularly concerned that the current branch of judicial services at the BIA will, under the current bill, receive a new name, additional responsibilities and duties, and more funding. Our concern is based upon the long history of the branch's unsatisfactory performance in meeting tribal needs.

This problem will and cannot be solved by merely changing the bureaucratic title from "branch" to "office." Something must be done to ensure that the BIA does not continue to do "business as usual" with respect to tribal courts.

Similarly, we believe the legislation should contain the single judicial conference concept contained in Senate bill S. 1752. Providing for multiple judicial conferences will only serve to further divide the scarce resources and encourage tribal courts to direct their energies toward competing for these resources as opposed to enhancing their judicial system.

Mr. Chairman, I realize my time is up. We have a great deal more to say, but you shall receive a copy, each one of you, of our testimony. Thank you very much.

[Prepared statement of Mr. Masayesva follows:]

TESTIMONY OF CHAIRMAN VERNON MASAYESVA, HOPI TRIBE  
BEFORE THE SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS,  
HOUSE COMMITTEE ON NATURAL RESOURCES  
CONCERNING H.R. 1268, THE INDIAN TRIBAL JUSTICE ACT

Good afternoon, Mr. Chairman. My name is Vernon Masayesva, and I am Chairman of the Hopi Tribe. I appreciate very much the opportunity to appear before the Subcommittee on Native American Affairs today, to discuss a matter that is of great concern to the Hopi Tribe, and to other tribes throughout the United States. The Hopi Tribe commends you, Chairman Richardson, and Representative Karan English, for taking the lead in seeing that the 103rd Congress will develop legislation to provide much needed additional funding for tribal courts.

I am submitting written comments on H.R. 1268 to accompany my presentation this afternoon, attached to my testimony as "Appendix A." I request that they be made part of the record of this hearing. The Hopi Tribe has very specific concerns about a number of provisions contained in the current bill as introduced, and we have provided these comments and suggestions in the hope that they will prove helpful in improving H.R. 1268 to a point where we will be able to express our support for it. The Hopi Tribe is encouraged to see these issues raised early in this Congress, and we strongly encourage the Subcommittee to continue working to enact legislation. Quite honestly, we would have preferred to see legislation introduced that more closely resembled S. 1752 that emerged in the Senate during the last Congress. In withholding our support for H.R. 1268 today, the Hopi Tribe pledges to work with both houses of Congress to develop legislation that we can support without qualification.

As you review our specific comments on H.R. 1268, you will note that several of them deal with issues relating to sovereignty. That is because the Hopi Tribe feels very strongly that any legislation that directs a federal agency to work with or study tribal governments, or in this case tribal court systems, must continue to emphasize the government-to-government relationship between tribes and the federal government. Thus, the legislation should specifically and expressly provide for tribal participation in all areas of any such studies.

Mr. Chairman, in many respects, issues relating to tribal court systems have been studied enough: what we need to see is action. The American Indian Policy Review Commission identified and discussed the need for additional funding for tribal court systems in 1976, but very little was done. Fifteen years later, in 1991, the United States Commission on Civil Rights studied the issue again, and reported a similar conclusion. H.R. 1268 proposes yet another review or survey of tribal justice systems, but states no purpose for the survey, or the intended use for its results. If it is deemed necessary that we endure yet another study, Mr. Chairman, we request that one point be made clear: the United States Congress should mandate that the results of this study be used to insure that tribal justice systems are adequately funded and brought up to a level that is comparable with similarly situated state and federal courts.



The Hopi Tribe is particularly concerned that the current Branch of Judicial Services at BIA will, under H.R. 1268, receive a new name, additional responsibilities and duties, and more funding. Our concern is based upon the long history of the branch's unsatisfactory performance in meeting tribal needs. This problem will not and cannot be solved by merely changing the bureaucratic title from "Branch" to "Office". Something must be done to ensure that the BIA does not continue to do "business as usual" with respect to tribal courts.

Similarly, we believe the legislation should contain the single judicial conference concept contained in S. 1752. Providing for multiple judicial conferences will only serve to further divide scarce resources and encourage tribes to direct their energy toward competing for those resources, as opposed to enhancing their judicial systems.

Rather than have tribal court systems competing for scarce resources, and having an enhanced bureaucratic presence at BIA, we believe the goal of this legislation should be to put more responsibility and adequate funding, into court systems, not into a BIA office.

The Hopi Tribe fully recognizes the timeless truth that holds a society responsible for providing justice for its members. Within our tribe, and within many other tribes, traditional systems for resolving issues remain as valid today as they have always been. And yet today, the Hopi Tribe, like many other tribes, operates under a constitution. The Hopi Constitution was adopted by our people in 1936, and under it, our tribe has established a court system that has become an essential part of the operation of the Hopi tribal government.

Under that constitution, the Hopi Tribal Council is vested with the authority to enact ordinances. Pursuant to that authority, it adopted an ordinance in 1972 establishing the Hopi Tribal Court System. Our court system is called upon to address a wide range of issues and disputes, and like any contemporary court system, it needs to be adequately funded to do the job well. As members of this subcommittee know, jurisdiction of tribal courts, and the jurisdiction of tribes over activities within reservation boundaries is a complex area of the law.

In conclusion, Mr. Chairman, the Hopi Tribe must respectfully express its opposition to H.R. 1268 at this time. But we express our strong support for continuing to develop legislation that will provide those badly needed resources for the many tribal court systems whose needs are so readily apparent. The Hopi Tribal Court, and indeed, the 133 tribal courts currently operating in other sovereign tribal governments, must be adequately funded if they are to continue in the difficult task of merging two diverse cultures, and their respective concepts of fairness and justice, into one workable court system. The federal government can best demonstrate its respect for tribal sovereignty, and its understanding of the difficult mission of tribal courts, by providing the funding needed to meet the challenge. Thank you.

Mr. RICHARDSON. I thank the gentleman, particularly for his timing.

I would like now to recognize the chief justice of the Leech Lake Tribal Court, the Honorable John Herrera. Mr. Chief Justice, please proceed.

#### STATEMENT OF HON. JOHN HERRERA

Mr. HERRERA. Mr. Chairman, Leech Lake Reservation appointed me the chief tribal justice about a year ago. Up until this time, our court system was like many other courts that were similarly situated, in not having legally trained personnel at all the bases. We do have that now in our court system. This is due, in large part, to a financial commitment that is being borne by the tribe through taxation of its gaming resources and other forms of taxation.

However, these resources, as new as they are and, hopefully, even these resources are under battle for the continued availability, are not enough to do the job that we need to see done. In fact, these resources have caused a dilemma and have caused a need for an expansion of the civil jurisdiction in the other areas—contract disputes and other things that have arisen that need to be addressed by our tribal court system.

Leech Lake is in support of the House of Representatives bill H.R. 1268 and encourages the further development of tribal input to consultation and judicial conferences.

We do not, as was mentioned here earlier, see a need to unduly study this issue. Leech Lake Reservation is concerned that we need immediate mobilization of resources out there at the tribal grass-roots level to address these needs. I am a part-time officer—or basically not the officer; I am also the chief justice. We have part-time officers of the court that double in other roles and other capacities for the Reservation, and so these people are being stretched in terms of their abilities, and we need further support of our legally trained people. We need to train our paralegal people.

There was talk in the bill of a computerized system, availability of codes by staff and information on the Navajo Nations' budgeting process. Things like this we have had the opportunity to do only recently. There are a lot of resources and availability of talent among other Tribes that have gone through things that we are looking at going through right now that could be made available through an effort such as this undertaking.

So we are again in full support of the House version. We see that there is a tremendous need in the State of Minnesota at this time. I don't know if you are aware that we are having a tremendous dispute around the hunting and fishing rights in the State. Our court system, when it was first started, it was a substantive jurisdiction. Our court was in the area of hunting and fishing. We have got a substantial body of law that has developed around this code. We are viewed in the State as the frontrunner in terms of how Tribes enforce their bodies of law and to the fairness of the judicial system, as exemplified at Leech Lake. Other Tribes are just now beginning to go through the process of compacting with the State, and they are not only in need of the support of our Reservation but also the support of this body and all our brethren out there that

are already at farther advanced stages in terms of court development.

So we see that the House version, especially as typified in the centralized communications, as being key. There are other Reservations that have gone through probably a lot of that same natural-resource-type disputes that we have gone through and continue to go through in Minnesota, and we think that we could be a benefactor of a lot of what has been learned in the process.

So I guess I have nothing else to add than this. We have a written formal testimony, and I appreciate any questions and so forth. [Prepared statement of Mr. Herrera follows:]

#### OFFICIAL WRITTEN TESTIMONY

(Prepared by: John R. Herrera, Chief Justice Leech Lake Reservation Tribal Court;  
For: Leech Lake Reservation Tribal Council)

Our comments and recommendations are prepared in response to a request from the U.S. House of Representatives Committee on Natural Resources. We understand that this committee proposes turning over responsibility for implementation of H.R. 1268 once enacted to the Bureau of Indian Affairs (BIA). The B.I.A. will establish an office known as the office of Tribal Justice Support.

Our view on the proposed bill will center first on comments relative to the approach that will be taken by the B.I.A. We recognize the approach as generally supportable. We feel and agree that in order to understand the diverse amount of Tribal judicial systems one needs to start by a review of the current systems.

From our standpoint the Leech Lake Reservation court system although established for over a decade has seen a rapid and continual evolution. The court has experienced changes in personnel while the amount of substantive law has increased. Today the court has evolved into one which has legally trained professionals at the level of judge, prosecutor and defense.

We have not always had legally trained persons in these roles and this is reflected in past ways the courts have operated. While the major court positions have been seen a movement toward legally educated personnel we need to assist our existing court support personnel with the legal types of training discussed in the bill.

Personnel at this reservation court need on going education and training at all levels of the system. We also, could use assistance in matching the personnel to the case load requirements. Our current support personnel are below acceptable levels needed to handle the existing through put of activity.

The proposed survey must be able to assist decision makers in identifying Tribal groups such as Leech Lake Reservation where growth of the Tribe and substantive jurisdiction has caused added demands on the court. An important emphasis should be on the growth potential of the individual Tribe, Leech Lake for instance, has only a limited substantive jurisdiction that encompasses election and conservation law. The court thus interprets what is given to it through those laws legislated by the Tribal Council and it's delegated sub-divisions.

Expansion of Jurisdiction will undoubtedly require further expansion of the court. Our concern here is that the current court system not be looked at on a snap-shot basis but be viewed as a moving picture. We are in our infancy in terms of substantive jurisdiction.

The Federal assistance being provided will assuredly be very competitively sought after. We feel that Leech Lake's needs are as strong as any ones. The Tribe has supplemented it's small B.I.A. contribution over the years in order to deal with the growing demands on the court.

Part of the slow evolution and expansion of law has been due in large part to the lack of funds available to the court. The court under adequate funding could assist the government of the Leech Lake Tribe in identifying codes that could be adopted. We are encouraged by the bills support of centralization of information relative to Tribal codes, we further hope that such information can be effectively shared.

The area of computerization and the development of a law library is obviously an area that is important to the effective administration of a court. We support the assistance discussed regarding this area. Leech Lake Reservation needs to develop a law library and add to it's existing physical court room/office areas.

We need computer systems to support legal research in addition to filing of court documents. The system if available could help streamline some of the information



flow now being generated. On a related basis the staff's level of experience in this area needs to be assessed with a view toward training needs.

Federal Assistance is needed and required by this Tribe in order to continue our refinement and performance evolution. We are optimistic that our current personnel provide the necessary foundation to reach the goals of providing a quality court service to our Reservation. The Tribal Council of Leech Lake is to be commended for its forward thinking and deference to Tribal court decisions.

#### *Recommendations*

We fully support the passage and implementation of H.R. 1268. We feel that there is an enormous demand nationally for this initiative to address a growing need on the part of Tribal governments. We encourage the swift implementation of the Tribal consultation portion of this act and will continue to provide our input as needed.

We stress the need to not only survey the current level of court operations but to review the amount of growth that is necessary to meet the demands of the Tribal government. Reservations like Leech Lake are in a growth stage of their court development and require detailed analysis with respect to the amount of additional substantive jurisdiction necessary to meet the civil law demands of its members. Growth in large part depends on the availability of resources which Tribes have typically had difficulty in providing on their own.

We feel that our continued involvement in the process can point decision makers in those directions that will lead to the most efficient use of the proposed funds. We have many ideas that in the interest of time cannot be fully addressed at this forum due to the nature of this testimony. We feel that Tribal courts working together can and will continue to share ideas and model codes that will help to overcome some of the competitiveness limited Federal funds stimulate.

In ending, we feel that the job of Tribal courts will strengthen the relationships between not only on the Federal government and Tribes but also State/local governments. We would expect that these funds will do a great deal in assisting Tribal governments through providing enhanced forums for dispute resolution. We encourage and support the passage of this bill so the diligent work of Tribal courts can further their needed judicial service within their communities.

Mr. RICHARDSON. Thank you, Mr. Chief Justice. I appreciate your statement.

Before I recognize Kevin Gover, I would like to ask the gentleman from American Samoa to briefly chair while I go outside. I should be right back.

Mr. Gover, please proceed.

#### **STATEMENT OF KEVIN GOVER**

Mr. GOVER. Thank you, Mr. Chairman.

Mr. Thomas, I bring greetings from Chairman St. Clair and Chairman Spoonhunter. In addition, the Arapaho Business Council endorses the testimony that we will be presenting today, so that the two Tribes are of the same mind on this matter.

First of all, we are in full support of H.R. 1268. The urgent need in the tribal courts is for additional resources. This bill will provide that, and it is an important matter that needs to be resolved in this session of Congress.

Second, the bill does this through the traditional devices upon which the Indian Tribes have come to rely. That is, the Bureau of Indian Affairs and the Self-Determination Act process.

The Bureau of Indian Affairs has not done a good job of administering the tribal court program to this point. They have been allowed to make the rules as they go. This is a Snyder Act program. It is a general authorization program, and there has been no guidance from Congress on how this program ought to be run. Therefore, the criticism of the Bureau that you will hear throughout these proceedings I believe is legitimate.

However, having said that, I don't think that we should throw out the baby with the bathwater. Just because the Bureau has not

done a good job on this program doesn't mean that we shut it down there and create a new agency. If that is going to be the policy of the committee and Congress, we soon will have dozens of new Federal agencies running Indian programs.

The proper approach is for this Congress to require the Bureau of Indian Affairs to run the program correctly, and that can be done by providing the clear guidance in H.R. 1268, by providing the resources necessary for the effective administration of the program, and by aggressive oversight by this committee.

We stand very much opposed to a tribal judicial conference, a single tribal judicial conference recognized by Congress and receiving its funding directly from the Congress. That was the approach taken in S. 1752.

The reason that we oppose it is that these two Tribes on the Wind River Reservation are general council systems. It is not a separation-of-powers system. We do not have an executive branch and a legislative branch and a judicial branch.

The tribal court is little more than an agency of the government, just like the other programs administered by the Shoshone Business Council. The Shoshone Business Council and the Wind River Tribal Court exercise only the power that has been delegated to them by the general council. It is not a coequal branch of government. And for that agency of the Tribe to be elevated in the mind of Congress to something more than it is, is simply incorrect.

Separation of powers is not a requirement of Indian Tribes, and in most cases it is not even wise. The reason is, very simply, that in a large government, such as a State or the United States, you can successfully remove a dispute from the community and set it before an impartial arbiter such as a judge; in a small community like most Indian Reservations, it is simply not possible to lift a dispute out of that community and set it before an impartial judge who is a member of that community. And so, wisely, these two Tribes have chosen not to employ a separation-of-powers system; instead, they rely on their traditional general council system, and it has served them well.

Mr. Chairman, we do have a number of specific comments on the bill. Those are in our written testimony. We would just say again that we support this bill, we urge its prompt passage, and we would be happy to answer any questions you might have.

[Prepared statement of Mr. Gover follows:]



CHIEF WASHAKIE

## SHOSHONE TRIBE

BOX 538

FORT WASHAKIE, WYOMING 82514



CHIEF WASHAKIE

TESTIMONY OF KEVIN GOVER,  
GOVER, STETSON & WILLIAMS, P.C., ALBUQUERQUE, NEW MEXICO,  
ON BEHALF OF THE SHOSHONE INDIAN TRIBE  
OF THE WIND RIVER INDIAN RESERVATION  
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON NATURAL RESOURCES  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

April 21, 1993

Mr. Chairman and members of the Subcommittee on Native American Affairs, my name is Kevin Gover, I am testifying in place of Darwin St. Clair, Sr., the Chairman of the Shoshone Business Council of the Shoshone Indian Tribe, Fort Washakie, Wyoming. Chairman St. Clair sends his regrets and is attending today a critical meeting concerning the tribal water rights dispute with the State of Wyoming. On behalf of the Shoshone Indian Tribe, I appreciate the opportunity to appear at this hearing and provide the Tribe's views on H.R. 1268, the "Indian Tribal Justice Act."

I would like to begin by commending Chairman Richardson for his continued support of tribal rights. I also would like to commend Ms. English of Arizona for co-sponsoring H.R. 1268, which has as its purpose the enhancement of tribal judicial systems. There is no question that strengthening tribal courts strengthens tribal self-government. The United States Supreme Court has made clear that strong tribal courts are at the heart of tribal sovereignty. The systematic enforcement of legal rights that tribal courts provide to both tribal members and non-members is essential to strong tribal economies and the health and safety of all reservation residents.

Today, two major problems hinder tribal development of court systems: lack of technical and financial resources and poor tribal court program administration by the Bureau of Indian Affairs. H.R. 1268 addresses both of these problems. The appropriations authorizations in the bill will make it possible to secure adequate funding for needed personnel, equipment, training, and technical assistance.

The bill also addresses the lack of administrative direction in the program. There is no question that BIA has done a poor job of administering the program. However, despite the Bureau's poor track record in administering the present tribal court program, the Tribe believes that leaving the program in the Bureau, and forcing the Bureau to operate it correctly, is a far superior approach to establishing a separate agency. Mr. Chairman, if Congress were to create a new agency for every program the



Bureau has run poorly, we soon would have dozens of new federal agencies and the Bureau would cease to exist. Congress can and should see that tribal justice systems are assisted properly. H.R. 1268 would give the Bureau explicit direction on how to proceed in helping tribes develop and operate effective judicial systems. We recommend aggressive congressional oversight of its implementation. If experience shows that the BIA cannot effectively run a program that is properly funded and as to which Congress has provided clear instruction, then Congress should consider alternative structures for running the program.

The Tribe believes that H.R. 1268 is a promising vehicle to begin addressing the needs of tribal courts. The Tribe has several comments about provisions in H.R. 1268. First, it is very important that the definition of "tribal justice system" remain broad enough to cover the types of dispute resolution practiced in traditional tribal governments. Many tribes choose not to have full separation of powers--judicial, legislative, and executive--and, thus, many tribes do not have distinct judicial branches.

Second, the creation of an Office of Tribal Justice Support ("Office") within the BIA is the appropriate way to address the current administrative deficiencies in the BIA by using existing resources. There simply is no proven need to establish a new, separate federal agency to support tribal courts. Such an approach would elevate tribal courts over other tribal agencies and would set a dangerous precedent of removing programs from the Bureau of Indian Affairs rather than making the Bureau operate programs effectively.

Third, the Tribe supports the inclusion of the language in Section 101(d) that makes clear that the bill is not authorizing the Office of Tribal Justice Support to impose justice standards on Indian tribes. This language must remain in any final legislation. In addition, we urge the inclusion of the disclaimer language contained in the Senate's version of this bill, S. 521:

#### TITLE V--DISCLAIMERS

##### SEC. 501. TRIBAL AUTHORITY.

Nothing in this Act shall be construed to--

(1) encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal court within the tribal government or to enact and enforce tribal laws;

(2) diminish in any way the authority of tribal governments to appoint personnel;

(3) impair the rights of each tribal government to determine the nature of its own legal

system or the apportionment of authority within the tribal government;

(4) alter in any way traditional dispute resolution forum[s];

(5) imply that any tribal court is an instrumentality of the United States; or

(6) diminish the trust responsibility of the United States to Indian tribal governments and tribal court systems of such governments.

We would oppose any legislation that even suggests limitations on the role of tribal legislative bodies in formulating policy on the operation and functioning of tribal courts. Moreover, we would oppose any legislation that would weaken the federal trust duty owed to tribes. We believe that this trust, as established in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), requires federal protection of tribal self-government and tribal political independence. The disclaimer language is needed to clarify the intended effects of H.R. 1268 and to place tribal justice planning where it properly belongs . . . in the hands of the respective tribal governments. The Tribe believes strongly that tribal governments must be the policy-makers for tribal justice systems, and each tribe must determine its own needs and priorities.

Fourth, the Tribe encourages the addition in Section 102 of a provision requiring measures to protect the confidentiality of certain records in setting up the information clearinghouse on tribal justice systems. Certain information and cases simply must be kept private. This would be particularly desirable with respect to personnel records and certain case records, including but not limited to matters such as adoption, juvenile adjudications, and financial and/or taxpayer information.

Fifth, Title II authorizes two or more tribes to establish a judicial conference which shall be eligible to receive and administer funds for performing "some or all of the duties of the Bureau and the Office" on behalf of the members of the conference. Title III goes on to include a limitation in Section 202: where a tribe has received financial assistance through a tribal judicial conference for any fiscal year, "the tribal justice system of that tribe shall not be eligible for assistance under Title I for that fiscal year." This limitation applies even though the judicial conference may be performing only some of the BIA's duties under sections 101 and 102 of the bill. Thus, in some cases, the limitation will serve as a real disincentive for tribes to set up a judicial conference because they may receive less funding. Again, because funding to enhance and develop tribal courts is the key barrier facing tribes, we urge the Subcommittee to revise Title II on this issue.

Finally, the Tribe requests an additional authorization of \$400,000

for each of the fiscal years 1994, 1995, 1996, 1997, 1998, 1999, and 2000 to cover the cost of the annual survey of conditions, resources, and needs of tribal justice systems as required in Section 102. We urge that this amount be authorized in addition to the amounts authorized in Section 301 of the bill. Again, the additional appropriation will help ensure that as much money as possible will be spent to benefit tribal courts directly, rather than to support administrative efforts within the BIA.

In closing, the Tribe supports the objectives of the Subcommittee on Native American Affairs and appreciates its efforts to improve tribal court programs. Chairman Richardson, your endeavors will help tribal governments develop effectively their tribal courts. In turn, effective tribal courts will help Indian tribes achieve self-determination and economic self-sufficiency. In turn, tribal self-determination will improve living conditions for all reservation citizens. On behalf of the Tribe, thank you again for the opportunity to testify.



CHIEF WASHAKIE

## SHOSHONE TRIBE

BOX 538

FORT WASHAKIE, WYOMING 82514



CHIEF WASHAKIE

SUPPLEMENTAL SHEET REGARDING:  
TESTIMONY OF THE SHOSHONE TRIBE OF INDIANS

HEARING BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
 COMMITTEE ON NATURAL RESOURCES  
 SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
 April 21, 1993

1. Witness Name and Title:

Kevin Gover, Attorney

2. Address of Witness:

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4. Summary and Recommendations of Testimony:

On behalf of the Shoshone Tribe of Indians, Kevin Gover, Gover, Stetson & Williams, P.C., will present testimony regarding H.R. 1268, the "Indian Tribal Justice Act." The Tribe believes that tribal courts must be developed and enhanced to strengthen tribal self-government and tribal economies. The greatest problem facing tribal courts is a lack of funding and ineffective tribal court program administration by the Bureau of Indian Affairs. The Tribe strongly believes that tribal governments must be the primary policy-makers for tribal justice systems, and each tribe must retain power to determine its own needs and priorities. The Tribe makes several suggestions and recommendations: (1) the definition of "tribal justice systems" must remain broad to cover traditional forms of dispute resolution; (2) the Tribe supports establishing the Office of Tribal Justice Support within the BIA, rather than creating a new agency; (3) disclaimer language such as that contained in the Senate's version of the bill, S. 521, should be added to clarify the effect of the legislation with respect to tribal sovereignty, tribal political independence, and the federal trust obligation; (4) a confidentiality requirement should be added in Section 102 to protect certain information in the clearinghouse; and (5) the funding limitation making tribes ineligible for assistance if they are members of a judicial conference should be revised to address circumstances where such conference performs only some of the duties of the BIA or the Office.

Mr. FALCOMA [presiding]. Thank you, Mr. Gover.

I would like to turn the time over to the gentleman from Wyoming for questions.

Mr. THOMAS. Thank you very much.

I am interested in the general concept, Chief Herrera, about the size that is needed. Is there a number that is required to support a judicial arrangement? I am wondering, the Tribes come in all sizes.

Mr. HERRERA. One of the things that I think we cannot do is look at the current level of service and stop at that point. If we did that, we would simply, at Leech Lake, for instance, be looking at the Reservation conservation code and the election ordinance, which is clearly too limited a scope.

What we are looking at at Leech Lake is expansion of our civil jurisdiction area and improved areas of domestic law as well as commercial contract law, which is needed because we have a number of instances there where we are having individuals, non-Indian people, that are doing a substantial amount of commerce on the Reservation. They're looking for the protection and exhaustion of local law, and we really have none to offer at this point.

So I think we have to project ourselves and look at what the substantive basis of the law is going to be and then estimate what the throughput in terms of caseload might be. And we need to focus on that process to really identify what the need is going to be.

Mr. THOMAS. So, in your instance, and probably others, your current system is not covering the needs entirely?

Mr. HERRERA. No. Our current system relies on a patchwork of law, typically a heavy reliance on State law, and the Tribe really needs to focus itself. And we are in agreement, we are looking at the development of the UCC code and building codes and other areas, zoning ordinances and things like this. They all need to be implemented, and along with our legislative people, we are looking at a focus, foci, of addressing a number of these different matters.

Mr. THOMAS. I guess the real thrust of my question was, can you devise a system that will apply to the different sizes of the needs, the different sizes of the Tribes and so on? It seems to me there is a limit to how small you can be and still set up an independent justice system, isn't there?

Mr. HERRERA. Well, I have an M.B.A. degree as well as my real background, and I would say from the economic standpoint that, yes, we could be able to project, on the basis of an expansion of substantive law and population and the amount of commercial intercourse that is going on, we could reasonably put together a budget.

Mr. THOMAS. Okay.

Justice Leslie, did you express some concern about the survey?

Mr. LESLIE. Yes, sir, that's correct.

Mr. THOMAS. Would you think a survey is not necessary?

Mr. LESLIE. Well, I think the surveys have been conducted on the Hopi tribal court, and the other Tribes, I believe, have already been done. However, the statement provided in the current bill for another survey, as we stated, does not really tell us what the survey is to be used for. It may be there, but if there were specific language in there telling us what it would be used for, we would then



consider that at that time. But it doesn't say that, and this is why we take that position.

Overall, we believe that tribal courts have been studied, Tribes have been studied moreover, and I am not sure what another survey would conclude at this point in time.

Mr. THOMAS. Well, it does seem, just in the sequence of things, that if there is going to be a survey, that the needs for funding would be determined after the survey was complete. I think this bill calls for a survey and also establishes the level of funding. How do you reconcile those two things?

Mr. LESLIE. I am not sure I follow you, sir.

Mr. THOMAS. Well, it would seem to me that a survey would be one of the tools you would use to determine what is the necessary level of funding. This bill arbitrarily sets a rather large level of funding. I think it's \$50 million a year, isn't it?

Mr. LESLIE. Yes.

Mr. THOMAS. How do you know that that is the appropriate amount?

Mr. LESLIE. Well, you see, I am not really sure how the \$50 million was arrived at to begin with.

Mr. THOMAS. Neither am I.

Mr. LESLIE. And maybe prior surveys were done, I am not sure. But if you look at the tribal courts across the Nation, there are over 100 tribal courts at this present time. If anything, if the tribal courts are to emerge and do the kind of job that they're intended to do, the current funding for the courts is not adequate at this point in time.

Mr. THOMAS. I suppose everyone would agree with that. It is hard to know the level.

Mr. Gover, what is the arrangement with the surrounding jurisdictions? Is that a smoothly operating process with the local county and State courts and this kind of thing?

Mr. GOVER. It's not terribly smooth right now. We are having some problem with cross-jurisdictional enforcement of judgments, child support, child custody orders, and that sort of thing. The Tribes actually tried to move a bill through the Wyoming State Legislature this year that would have granted full faith and credit to tribal court judgments in the State courts. Unfortunately, that bill failed. And I believe that the State courts are obliged in any event to honor tribal court judgments as a matter of comity. I also believe that the tribal court is required to honor State court judgments as a matter of comity. But at this point I can't say that it's going well.

Mr. THOMAS. Do any of the rest of you have any comment on the jurisdictional problem?

Mr. MERCIER. Yes, sir. Specifically, our Tribe has just negotiated with our respective State, the State of Oregon. It is called the Indian Child Welfare Agreement. In that agreement the State of Oregon has a set of criteria that is already agreed upon by both parties where they automatically transfer their jurisdictions of Indian child welfare cases and such, custodial disputes, over to our Tribe. And so I think our tribal court load is going to increase dramatically because that agreement was signed by the Governor and I just about 30 days ago, if even that. So I think our court loads are



going to increase by about 50 percent. This has been estimated by our social services department.

Mr. THOMAS. Anyone else?

[No response.]

Do any of you have any comment, again, on the funding; some little more specific notion why that is the appropriate amount of funding? Does anybody know?

Mr. GOVER. Mr. Chairman, we could offer, as I recall, the tribal court budget at Shoshone and Arapaho Tribes is \$350,000 a year. At this time they are receiving \$100,000 from the Bureau. So at least in our case basically we need 2½ times more than what is being provided now by the Bureau. I do believe the number was arrived at based on some estimations, working from previous surveys that had been done involving the tribal court judges and the Bureau of Indian Affairs. So it's not arbitrary, but it certainly couldn't be said to be scientific at this point.

Mr. THOMAS. Thank you. I have no further questions, Mr. Chairman.

Mr. RICHARDSON. [presiding]. I thank the gentleman.

The Chair recognizes the gentleman from American Samoa.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. Just a couple of questions for the members of our panel here this afternoon.

I took with interest your comments. A couple of you said we really don't have much of a choice, we have to deal with the Bureau of Indian Affairs, perhaps suggesting there may be another option on how best to handle the situation with the tribal courts, but yet reluctantly. I seem to hear that reluctance, "We have to deal with the Bureau of Indian Affairs in this regard."

Is there any real reason for this, or is it primarily because of the funding aspects of the bill, what the bill proposes? I sense that you are really unhappy with the way the Bureau has been handling tribal court deeds over the years. That is an understatement of the year, I suppose. But can you tell us where your real options should be if perhaps it could be taken out of the jurisdiction of the Bureau of Indian Affairs? Do you have a national tribal court association in place, or do you have some kind of a national association that oversees and discusses the needs of the various tribal courts throughout the country, or am I out on a limb here? Can some of you respond?

Mr. LESLIE. There is the National American Indian Court Judges Association, which is very active at this point in time.

Mr. FALEOMAVAEGA. Do you suggest that they can perhaps also be an integral part of the legislation. Could they in some way help, rather than just leaving everything to this office that we are going to be creating? I sense that we are just going to be adding another layer to the problems. The Bureau of Indian Affairs has enough problems already, with all the other issues, and now we are going to give them another problem to deal with, and they may not necessarily have the resources or the expertise to deal with it. That about law schools, what about institutes, what about some of these other NGOs—maybe I shouldn't call them NGOs—but other organizations that could be helpful to meet the needs of the tribal courts? Yes?

Mr. MERCIER. Well, it's our Tribes' feelings that we are aware of the problems within the Bureau of Indian Affairs, but if the tribal courts are removed from there, then before long it would seem like somebody is going to target another program within the BIA. And what is to prevent the Tribes from having to deal with about X amount of different entities all total? The problem is, if you put it under the Department of Justice, how familiar would the Department of Justice be with Indian Tribes, their sovereignty, the way their Tribal courts operate, and so on and so on?

So, to us, our Tribe specifically, we think it would be more logical to get together with the Bureau of Indian Affairs and identify the problems and work collectively to get them ironed out. We believe that it's very possible to do just that.

But to establish just a totally separate entity then it is totally unclear who would specifically be accountable, what kind of communication they would have with the Tribes that would be directly affected for funding and other matters associated with tribal courts? That is always what frightens our tribal council—when we are really unclear about another new entity that would be taking responsibility away from an existing agency.

Mr. LESLIE. Mr. Chairman, we would recommend, as I stated earlier, that there be something done. I guess that's what you're asking. We are saying that the Bureau be held in some way accountable for its actions. There should be somebody to oversee the Bureau to make sure that problems are identified and problems are corrected, and that things are done within the agency so that these problems can be eliminated. I am not sure who can do that or what can do that, but that is basically what we are saying.

Mr. GOVER. Mr. Chairman, it seems to me there are two ways to force the Bureau to do what it is required to do. The first is congressional oversight. But the second is that, armed with the provisions of legislation like this, we can sue the Bureau to require them to do the things they're supposed to do.

The problem right now is, this is a Snyder Act program and there are no rules. There is no law that tells the Bureau how this program is supposed to be run and that gives the Tribes any leverage in dealing with the Bureau. That's why we need this sort of legislation.

Mr. FALEOMAVEGA. At least for starters. What has been your experience in dealing with the problems with the State courts versus tribal courts? And of course this is always an ongoing problem. Do you think that perhaps the Congress needs by definition or by law a better sense of understanding in terms of the jurisdictional problems that sometimes State courts have against tribal courts? Are you having any serious problems with that, or is everything okay?

Mr. GOVER. We have few actual jurisdictional disputes with the States. We know what jurisdiction the State has, and they know what jurisdiction the Tribes have. That is not a primary issue. And particularly on civil matters, we are both pretty clear on who has the authority to do what to whom. It's when we have these cross-jurisdictional issues where there is a judgment on the Reservation that has to be enforced off the Reservation where we are having

some breakdowns. But the pure jurisdiction issue has been pretty much resolved by the Supreme Court.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman.

Mr. HERRERA. Could I add a comment to that? In Minnesota we are looking at a lot of commercial expansion of the law. A number of Reservations have enacted a corporate code so that not only Tribes can incorporate but also individuals can incorporate under tribal law. We are looking at a number of things such as banking codes, SEC—Securities and Exchange Commission—blue-sky type of legislation that normally States exercise. We are looking at lot of things, licensure areas, things like that. Yes, we know we have similar jurisdiction, but we don't have the legislation that we can look at.

Mr. RICHARDSON. I thank the gentleman.

Let me ask Mr. Gover, since he has worked many hours on this issue, I take it that you have studied S. 1752 extensively.

Mr. GOVER. Extensively.

Mr. RICHARDSON. Under that bill, the national tribal judicial conference mandated a Federal funding formula. In your judgment, is that a significant Federal function?

Mr. GOVER. Very clearly. Very clearly. And that was not the only function of the judicial conference. It would have also basically been administering all of the contracts for the funds to the Tribes. And that, of course, was the big issue, in our judgment, in terms of the constitutionality of the statute.

You cannot have a non-Federal officer performing substantial Federal duties. That is a violation of the appointments clause, and that was precisely the scenario that was set up by the judicial conference concept.

Mr. RICHARDSON. So, what you are saying is that there is a problem, a constitutional problem, with the appointments clause?

Mr. GOVER. Clearly. And I think that is why we would have had enormous difficulty moving that bill through the Judiciary Committee.

Mr. RICHARDSON. Now, to Judge Leslie, back again on this national judicial conference, you support it. What would you propose for those Tribes that don't want to join the judicial conference and don't participate in the funding formula? What is the Federal responsibility to those Tribes?

Mr. LESLIE. Mr. Chairman, I believe that each Tribe is entitled to services from the Federal Government. Now, to narrow that a little bit, any tribal court or any CFR court in the United States is entitled to services from the Federal Government, in this case, regardless of whether or not they want to participate in a judicial conference. I do believe that a judicial conference would not be mandatory, but it would be at the pleasure of each Tribe whether or not they want to participate. Because they don't want to participate does not mean that they should not receive benefits from the judicial conference.

Mr. RICHARDSON. Chairman Mercier, how do you feel as a tribal chairman—you obviously have been very involved in this—how would you feel about a national judicial conference dictating funding formulas? Isn't that a problem for you?



Mr. MERCIER. Absolutely, it would be a problem. When we were reviewing S. 1752, the thing that alarmed us the most about this was that this judicial conference, to the best of my knowledge, would have been accountable to Congress within the whole. There were no provisions that I could see in there that would allow the Tribes to get their input, to ensure that someone was ultimately responsible within the conference to provide that the funding was, No. 1, fair and equitable? Based upon the analysis that our Tribe did on this, there was no system in place that would assure that.

I hope I answered your question there.

Mr. RICHARDSON. Oh, you did. You did.

I think before I call the next panel and before I turn the gavel over briefly again to my colleague from American Samoa, let me just say that it has been implied by a couple of groups here this morning that they prefer a bill which passed the United States Senate in the last Congress. The position that the House took last year is, very simply, that we would not take up that bill, for several reasons. First, it gets referred to the Rules Committee; second, it mandates House floor procedures; third, it mandates a national entity that some Tribes just don't want; and fourth, I think as we have heard from several witnesses, that it may be unconstitutional under the appointments clause.

So, for these reasons, the position of the House remains unchanged. I think the bill before you—and I asked the staff to try to work something out with the Senate—is basically a compromise. And right now—and I am going to be open for further testimony today—that is about as far as we are going to go. I hope you pass this message on to the other body, and I hope that they introduce the bill that we have here today.

I think we can work out minor differences, but we have to move this bill forward. The biggest problem, in my judgment, is one of Tribal resources, and if we move forward, I could almost guarantee, if there is consensus, that we would have a public law by October. But if we keep dilly-dallying on this issue, we are not going to get anywhere and this subcommittee has a very, very broad agenda. That agenda is economic development; it's the American Indian Religious Freedom Act; it's a number of health care issues. We want to make sure that the health care component is part of the Administration health care bill. We have the Indian gaming issue that is about to explode.

So, again, I want to send a very clear message—and I will listen to some more of the testimony—but it just does not seem, for the reasons that I mentioned, that we are ready to take a look at that Senate bill again. It's as simple as that. If they persist in pursuing the same vehicle as last year, we are just not going to move anything and move on to other issues. There are too many issues that we need to deal with.

Thank you very much to the panel.

I would now like to call on Ms. Denise Homer, the chief of the Division of Tribal Government of the BIA, the Department of the Interior.

Ms. Homer, welcome to this committee.

I would like my good friend, the gentleman from American Samoa, to chair until the chairman returns.

Thank you very much.

Mr. FALEOMAVAEGA [presiding]. Without objection, Ms. Homer, your statement will be made part of the record. So, welcome to the subcommittee, and you may proceed.

**STATEMENT OF DENISE HOMER, CHIEF, DIVISION OF TRIBAL GOVERNMENT, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY BETTY RUSHING, CHIEF, BRANCH OF JUDICIAL SERVICES**

Ms. HOMER. Thank you. Good afternoon, Mr. Chairman. I am here today to present the views of the Department of the Interior on H.R. 1268, a bill to assist the development of tribal judicial systems. Accompanying me today is Betty Rushing, Chief, Branch of Judicial Services.

The Department of the Interior supports the underlying intent of H.R. 1268 and the efforts of this Committee to improve and strengthen tribal judiciaries and courts of Indian offenses, but we cannot support taking funds from other programs that demonstrate a need equal to that of tribal courts. Nor can we support displacing Tribal Governments in the determination of program priorities and operations through the tribal budget system.

We do have specific concerns with H.R. 1268. We believe that the formula approach used in H.R. 1268 to fund tribal courts could impair the flexibility of Tribal Governments to reallocate resources on the basis of priority and could conflict with the recommendations of the Joint Tribal DOI/BIA Task Force that Tribes should have control over the resources appropriated for their benefit.

The projected cost to fulfill the requirements of H.R. 1268 could reach \$58 million annually and should be carefully considered with respect to the Federal deficit and other Indian program needs.

In addition, it is unclear whether H.R. 1268 increases mandatory spending which would be subject to the pay-as-you-go provisions of the Budget Enforcement Act.

We do not support the elevation of the Branch of Judicial Services to an office. We would, however, consider recommending to the Joint Tribal/DOI/BIA Task Force on BIA Reorganization that a division be established administratively. Elevation to a division within the Office of Tribal Services would not unnecessarily duplicate budget, finance, and planning personnel or the support services required for the administration of an office, but would provide greater coordination with other Tribal Government services and programs, particularly social services, child protection, Tribal Government services, and self-determination.

We do support a survey of the type proposed in H.R. 1268 of tribal judiciaries and courts of Indian offenses. For that reason, we are planning in FY 1994 to request \$250,000 from the special tribal court program to contract a study of the needs of tribal judiciaries and courts of Indian offenses.

In addition to collecting data, this study is intended to address equity funding, economies of scale, the variations among tribal communities, governments, and traditions, automation, education and research requirements, as well as the needs of a growing number of Public Law 280 and similarly situated Tribes desirous of developing tribal forums.

This concludes my prepared statement, and we will be happy to answer any questions.

[Prepared statement of Ms. Homer follows:]



STATEMENT OF DENISE HOMER, CHIEF, DIVISION OF TRIBAL GOVERNMENT, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, ON BILL H.R. 1268, THE INDIAN TRIBAL JUSTICE ACT OF 1993.

April 21, 1993

Good afternoon Mr. Chairman and Members of the Committee, I am here today to present the views of the Department of the Interior on H.R. 1268, a bill to assist the development of tribal judicial systems. Accompanying me today is Bettie Rushing, Chief of the Branch of Judicial Services.

The Department of the Interior supports the underlying intent of H.R. 1268 and the efforts of this Committee to improve and strengthen tribal judiciaries and courts of Indian offenses but we cannot support taking funds from other programs that demonstrate a need equal to that of tribal courts. Nor can we support displacing tribal governments in the determination of program priorities and operations through the tribal budget system.

We do have specific concerns with H.R. 1268. We believe that the formula approach used in H.R. 1268 to fund tribal courts could impair the flexibility of tribal governments to reallocate resources on the basis of priorities and could conflict with the recommendations of the Joint Tribal/DOI/BIA Task Force that tribes should have control over the resources appropriated for their benefit.

The projected cost to fulfill the requirements of H.R. 1268 could reach \$58 million annually, and should be carefully considered with respect to the Federal deficit and other Indian program needs. In addition, it is unclear whether H.R. 1268 increases mandatory spending which would be subject to the pay-as-you-go (PAYGO) provisions of the Budget Enforcement Act (BEA).

We do not support the elevation of the Branch of Judicial Services to an Office; we would, however, consider recommending to the Joint Tribal/DOI/BIA Task Force on BIA Reorganization that a division be established administratively. Elevation to a division within the Office of Tribal Services would not unnecessarily duplicate budget, finance and planning personnel or the support services required for the

administration of an office; but would provide greater coordination with other tribal government services and programs, particularly social services, child protection, tribal government services and self-determination.

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This concludes my prepared statement. I would be happy to answer any questions the Committee Members may have.

Mr. FALEOMAVAEGA. Thank you, Ms. Homer.

You indicated earlier in your testimony the fact that, based on recommendations of the Joint Tribal/DOI/BIA Task Force, perhaps we should await the recommendations or consider the recommendations of this task force.

Our subcommittee held an oversight hearing on this, bringing the task force to testify before the subcommittee. Their indication to the subcommittee is that it is going to take well over a year before they complete this survey or this study that is being conducted.

Are you suggesting that we ought to wait another year before we initiate some formal legislation to resolve the problems that we are faced with as far as tribal courts are concerned?

Ms. HOMER. No. What I was referring to, referring to the tribal task force, was the elevation of the Branch of Judicial Services to a division. All we need to do there is to present this to the task force at one of their future meetings, and they would either approve or not approve. I think the indications were in previous task forces that they would support the elevation of this office to a division. So that would not take a year. I was not referring to the survey.

Mr. FALEOMAVAEGA. Do you feel that perhaps what the proposed bill is providing is that the office itself is not elevated sufficiently as far as the hierarchy of the administration of the BIA is concerned?

Ms. HOMER. Currently?

Mr. FALEOMAVAEGA. What the bill is suggesting here, providing for the office?

Ms. HOMER. Well, our main objection is that it would cost money, obviously. It takes more money to establish an office within the Department of the Interior than to establish a division.

Mr. FALEOMAVAEGA. Okay.

Ms. HOMER. That is our main concern. It has to do with the availability of funds to establish an office as versus those available for a division.

Mr. FALEOMAVAEGA. Well, maybe it's a matter of semantics. We can just simply change the word "office" to the word "division." Will that meet your concerns?

Ms. HOMER. Yes, sir.

Mr. FALEOMAVAEGA. Okay.

Now, could you explain the situation in terms of the tribal court needs for your fiscal year budget? FY 1994, at least for this fiscal year, how much is being proposed by the Administration to provide for the needs of the tribal courts?

Ms. HOMER. \$15 million.

Mr. FALEOMAVAEGA. \$15 million?

Ms. HOMER. Yes. Close to \$16 million. Actually, it's \$15.7 million.

Mr. FALEOMAVAEGA. And this has been the constant request for the past 5 years, or is this an increase or decrease?

Ms. HOMER. The amount of money for tribal courts has had a slight increase over the last several years. This current year, our appropriation is \$14.9 million.

Mr. FALEOMAVAEGA. And that is out of the total BIA budget for this fiscal year of how much? What is the total BIA budget proposed by the Administration?

Ms. HOMER. I believe it's \$1.5 billion.

Mr. FALEOMAVAEGA. \$1.5 billion. You indicated earlier that there are other, competing interests as far as priorities are concerned. How does that match with a \$1.5 billion budget? We are only asking for \$15 million for the tribal courts. You don't consider this to be a high priority, or you just think that there are other, competing interests more important than this issue?

Ms. HOMER. They are all equally important, but I guess when we have a certain amount of money that we have to allocate to Tribes, the decisions are made as to which program is more important in any given year. I don't think that you will find that many of the other programs receive a lot more funding than tribal courts do, and it all comes back to the fact that we have limited dollars.

Mr. FALEOMAVAEGA. Has there been any indication by this Administration in terms of the priorities? Let's say, what is Secretary Babbitt's list of priorities for this year for Indian country?

Ms. HOMER. I haven't really seen anything come down to my level from Secretary Babbitt as far as Indian programs are concerned. So I really couldn't answer that question.

Mr. FALEOMAVAEGA. I see. So we are somewhat in the dark.

Ms. HOMER. Considering the fact that we don't have an assistant secretary or a deputy commissioner, we are still kind of in limbo.

Mr. FALEOMAVAEGA. How soon do you think we might get an appointment on this?

Ms. HOMER. You're asking the wrong person. I have no idea.

**PANEL CONSISTING OF HON. CAREY VICENTI, CHIEF TRIAL JUDGE, JICARILLA APACHE TRIBAL COURT, DULCE, NM; HON. ROBERT YAZZIE, CHIEF JUSTICE, NAVAJO NATION JUDICIAL BRANCH, WINDOW ROCK, AZ; AND HON. ELBRIDGE COOCHISE, PRESIDENT AND CHIEF JUDGE, NORTHWEST INTERTRIBAL COURT SYSTEM, EDMUNDS, WA**

Mr. FALEOMAVAEGA. We have for our next panel that will now appear before the subcommittee the Honorable Carey Vicenti, the chief judge of the Jicarilla Apache Tribal Court; the Honorable Robert Yazzie, the chief justice of the Navajo Nation Judicial Branch; and also the Honorable Elbridge Coochise, the chief judge of the Northwest Intertribal Court System in Edmunds, Washington.

Are these gentlemen here with us?

Mr. Vicenti, would you proceed?

#### STATEMENT OF HON. CAREY VICENTI

Mr. VICENTI. Thank you, Mr. Chairman.

I would like to give at least an opening special thanks for the passage of the Bureau legislation and recently for the Jicarilla settlement. I waited my entire adult life for that settlement to come through, and I am glad to see that eventually we will get on the road to some economic development.

A short response of the Jicarilla Apache Tribe to the introduction of this bill is that we are in support of this legislation, H.R. 1268, with some major caveats. But first I would like to make some com-



ments about the courts themselves, and I hope I can infect you with my enthusiasm about this.

We are the engines of economic development on the Reservations. We assure that there is a stable government with whom banks can deal and expect that there are going to be fulfillment of expectations. We minimize the destructive forces within tribal society. We prevent economic loss. We encourage social cohesion and cooperation. We ensure that there is a healthy workforce.

We do identify and protect some very important traditional values, and as such, I guess you can conclude that we are a basic element of the tribal infrastructure and ultimately lead to governmental viability and we therefore assure outside investment. That element really does suggest that you are not the only source of money that we should be going to, but without a strong court system I don't see the outside investing in the Tribes themselves.

Then, finally, we have become increasingly the means of negotiating State and tribal relations.

But the courts do not do their work in isolation. We do need important questions of law settled, jurisdictional questions, questions of choice of law, questions of full faith and credit and comity, issues of the trust responsibility, and the internal tribal law itself, which can be complex on its own.

We do need competent law enforcement, incarceration facilities, court facilities themselves, which are not being discussed really at present, juvenile detention facilities, rehab programs, competent Bureau support which does not fight against our operations, which at present it does. We need foster care placements, foster care funding, mental health inpatient care. We need access to medical and psychological testimony and nursing homes.

Now, we need those to operate. I can be a wonderful judge, but if I don't have those, I can sit there with a case incapable of being decided.

Hence, I think our first comment about the bill is that it is entitled the Indian Tribal Justice Act, and it is a bit too ambitious. We perceive it as a funding bill in its essentials. I think if we stick to that name, we also might suggest that this is a bill that is comprehensively dealing with Indian justice and may mislead the future.

In light of the funding objectives of this bill, I think it would be more appropriately called the Indian Tribal Courts Emergency Funding Act.

Now, the bill itself is structured so that it creates the Office of Tribal Justice Support—and I always twist up on that, so let me just call it OTJS—endowed with certain powers. It allows for the creation of judicial conferences. It provides funding to the court, subject to a secretarial formula.

Now, I do recommend that we do make a little bit harsher findings with respect to the emergent character of the funding. Viable courts are essential to long-term development of the Reservations. Because the American Indian Policy Review Commission did recommend great infusion of capital back in 1976 or 1977, I think we have delayed the building of our infrastructure far too long.

More specifically, the Jicarilla Apache Tribe approves of the creation of the Office of Tribal Justice Support. We think it is appro-

priate to centralize and elevate that function. But we will be real honest with you. We find the BIA to be extremely inefficient and insensitive to tribal court needs. And while we say you can elevate and centralize it, we think that if they are going to expand the tasks at all, it should be simply to ensure that the Bureau functions are tailored to assist the courts rather than obstruct them in their performance.

I will be blunt with you, too, on another point about this legislation. We are basically indifferent to the judicial conferences provisions. In deference to my colleague and good friend, Justice Yazzie, and all the others who are supportive of S. 1752, I would have to say that that may be an issue that is better postponed and left out of this bill at this point. It may obstruct our real goal, and that is to get funding to the tribal courts.

On the question of funding, we are concerned about the ultimate formula. We think that the use of the terminology "base funding" may also mislead and connote that this is what it is going to take. But I suspect that after the appropriations process is done, that what we are going to have is an equitable apportionment of what is actually available. So it may be misleading, and I would just like to correct it in the record somehow.

As long as the Bureau is in existence, it's there to be the conduit for money. But we would insist that if it is going to be a conduit, that there be no skimming, there be no set-asides, we just take it down to the barest of administrative costs.

I do want to point out for the benefit of Congressman Thomas, in his absence at this point, that we operate a system of about 3,000 people. It costs us \$300,000 a year. I suspect it would cost us \$400,000 a year. That means that the cost is somewhere from \$100 to \$133 per person for basic operations.

We still have a big infrastructure deficit. We have never received funding from the Bureau except for recent allocations from the tribal court funds. And that infrastructure development—facilities, a library, training, and that sort—really means that we may have extra monies, we estimate it about \$500,000, just to build up that infrastructure.

Let me close by perhaps unveiling something about my testimony. The problem that I perceive in the legislation is that by including reference to the judicial conferences and including an expansion of the Bureau functions, you have dropped on us a couple of very highly debated political issues here in the Indian community which eventually may obscure our real concern. And I can almost assure you with absolute certainty that you will hear every Tribe say that we need the money. And I suspect that we will have enough of a political battle over the funding formula. And my recommendation would be to omit references to the expansion of the Bureau or references to the judicial conferences, and we can get to that money issue.

I will close with that.

[Prepared joint statement of Messrs. Atole and Vicenti follows:]





Jicarilla Apache Reservation  
February 11, 1887-1987

## THE JICARILLA APACHE TRIBE

EXECUTIVE OFFICES  
P.O. Box 507, Dulce, New Mexico 87528-507  
(505) 759-3242

### TESTIMONY OF PRESIDENT LEONARD ATOLE AND CHIEF TRIAL JUDGE CAREY VICENTI

#### JICARILLA APACHE TRIBE

#### HEARINGS ON H.R. 1268 "INDIAN TRIBAL JUSTICE ACT" BEFORE THE

#### SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS UNITED STATES HOUSE OF REPRESENTATIVES

April 21, 1993

#### I. Introduction

Mr. Chairman and members of the Subcommittee on Native American Affairs. The Jicarilla Apache Tribe has followed with great interest and concern the legislation presently pending before you and appreciates your invitation to present testimony on H.R. 1268. On April 14, 1993, the Jicarilla Apache Tribal Council deliberated the merits of the pending legislation on tribal court systems, the testimony we submit today reflects Council's positions on this funding legislation. These positions are consistent with Tribal Resolution 92-R-413-5 previously submitted to the Subcommittee.

The Jicarilla Apache Tribe supports the passage into law of H.R. 1268. Although we believe that the Bill must be amended to increase tribal participation in the formation of the funding formula and to avoid the duplication of services within the BIA, we also enthusiastically endorse the legislative initiative, as reflected in both H.R. 1268 and S. 521, to provide additional resources and funding to strengthen tribal court systems. Last year, the Tribe submitted testimony and correspondence on H.R. 4004. We were pleased when H.R. 4004 was amended to provide for the provision of funding to Indian tribes for their judicial systems in as relatively efficient manner as possible without the imposition of standards or interference with the government-to-government relationship. We are pleased to see that H.R. 1268 preserves the most positive aspects of H.R. 4004 as passed by the House last year, and also provides for the voluntary formation of



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tribal judicial conferences. As discussed further below, however, we believe that this Bill represents only the first legislative step needed to strengthen tribal judicial systems. This Bill provides needed funding for tribal courts and as such might be more appropriately called "The Tribal Justice Emergency Funding Act." However, there are many ways in which the policies of the federal government undermine tribal courts and we encourage Congress to address these issues today or in the near future to strengthen tribal judicial systems without the necessity of additional resources.

## II. Status Of The Jicarilla Apache Tribal Court

As noted last year, the lack of federal funding and resources remains the biggest obstacle facing tribes as they develop effective tribal justice systems. As an example, until last year, the Jicarilla Apache trial court was 100% tribally funded, despite repeated requests for funding submitted to the BIA. No rational reason was ever offered for the denial of federal funding.

Two full-time judges, both of whom have law degrees, a court administrator, a part-time prosecutor and several court clerks staff the tribal trial court. Nine pro tem judges also assisted in handling a combined civil and criminal caseload of close to 4,000 cases last year. In addition to the trial court, the Jicarilla Apache Tribe has an appellate court.

Because of the scarcity of tribal resources and other pressing governmental and social services needs, the tribal court budget has not seen a real increase for five consecutive years. The \$250,000 the tribe annually allocates to its trial court is money it can't use to solve the rampant unemployment and other needs on the Reservation. Although training is mandated by tribal policy, there are insufficient funds to provide that training. The trial court is in dire need of additional staff, a public defender, a full-time prosecutor, law books and space to house the books, additional court and office space, updated equipment and monies to repair, expand and modernize the court and juvenile and adult detention facilities. Too often important court proceedings are interrupted by the emergency of fixing a busted pipe.

The funding and staffing problems are particularly acute given the demands placed on the Jicarilla Tribal Court. Two state thoroughfares cross the reservation, the Tribe has a very large wildlife, game and fishing program which attracts tourists, fishers and hunters from throughout the region, substantial oil and gas activity occurs on the reservation, and the Tribe has enacted and codified numerous ordinances regulating business, the environment,

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oil and gas and other activities on the reservation. Our Tribal Court is frequently called upon to enforce those laws in proceedings involving members of the Tribe, non-member Indians and non-Indians. The Tribe believes that its tribal justice system is an integral and essential element of its tribal government. The particular structure of the Jicarilla Tribal Court is a response to the unique needs, culture, history and traditions of the Jicarilla Apache Tribe and is itself an exercise in self-governance.

We must also recall that courts do not exist in isolation, but also depend upon the support of tribal and federal institutions to carry out many of their orders. For example the courts need the support of a competent police force; adequate codes of law; appropriate jail and juvenile detention facilities; properly trained and staffed social service offices; foster care funding, and mental health facilities and professionals to name a few of the corollary support services. In addition, the Court must receive the BIA and IHS' respect and compliance with lawful Court Orders. Because many of the issues surrounding the delivery of justice services are not addressed in H.R. 1268, the Tribe urges Congress to recognize that this Bill only addresses the gross inadequacies in funding levels for tribal courts, but does not comprehensively solve some of the problems facing tribal courts which often emanate from the federal government itself.

### III. Specific Comments on H.R. 1268

#### 1. Section 101 - The Office of Tribal Justice Support

##### a. The office's functions are too broad.

The Jicarilla Apache Tribe supports the creation of an Office of Tribal Justice Support within the BIA to serve as a conduit of funding to Tribes for the benefit of tribal justice systems. The Jicarilla Apache Tribe recognizes that the absence of federal funding is one of the biggest obstacles to the development and strengthening of tribal court systems throughout Indian country. With additional funding, tribes themselves can study and implement training programs to improve the administration of justice in their particular system.

The Tribe does not support, however, the use of the Office to provide technical assistance, continuing legal education, training, and the other functions described in §§ 101(c)(1), (3), (4) and (5). In the Jicarilla Apache Tribe's experience, the BIA has been unable to perform these functions in the past and we see no reason for increasing federal bureaucracy when these services are already

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available from other Indian and business organizations. Furthermore, these duties impinge upon the independence of tribes and their courts. The Jicarilla Apache Tribe knows its needs better than anyone, we also know how to solve those needs given adequate resources. We should be free to use federal funds to contract with the National American Indian Court Judges Association, the National Indian Justice Center, or any other Indian or non-Indian entity which we feel could best serve our training needs.

Additionally, placing the responsibility for providing these services on the BIA is extremely inefficient. Because of the diversity of tribal justice systems, their training needs run the gamut from sophisticated computer research capabilities to mediation techniques. The distinct geographical and cultural factors also influence the type of training best suited for distinct tribal justice systems. We should not expect that a single office could acquire this diverse wealth of knowledge in an efficient manner.

b. No imposition of standards.

Section 101(d) incorporates one of the Jicarilla Apache Tribe's main concerns last year: that judicial legislation not serve as a tool to impose standards from the outside on the diverse tribal court systems. However, this disclaimer only applies to Section 101. It should be broadened to apply to the entire bill. Additionally, Sections 101(e) and 103(c)(2) should be amended to comply with Section 101(d).

c. Technical assistance to Tribe.

Once again, the Jicarilla Apache Tribe questions whether the BIA is best suited to provide the technical assistance to tribes contemplated in §101(e). For example, the Tribe has developed ordinances and codes regulating conduct ranging from wildlife management to oil and gas activity to environmental protection to court administration. The Jicarilla Apache Tribe developed these codes internally with the advice of experts of its own choosing. The Jicarilla Apache Tribe recognizes that this freedom of choice is provided in §101(e)(2) inasmuch as technical assistance may be provided through grants to Indian tribes. The Jicarilla Apache Tribe, nevertheless, worries about the tendency of the Bureau to attempt to accomplish this training in-house which may affect its willingness to award grants to Indian tribes or organizations. Finally, the Jicarilla Apache Tribe is cognizant of the homogenizing effect BIA may have in proposing boilerplate codes and court administrative procedures. We recall the use of boilerplate

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constitutions following passage of the Indian Reorganization Act. The Jicarilla Apache Tribe has had to review and reform that model constitution five times since its adoption because the form Constitution simply could not and did not reflect the Tribe's own history, traditions and decisions on how to structure its government and laws.

As noted earlier, the Court also needs the support and assistance of agencies of the federal government to enforce lawful court orders. This is especially true in foster care placements, child and adult welfare cases and foster care funding. We need assistance from the federal government to investigate cases and of IHS physicians to testify on commitment and child welfare cases. Lamentably, our courts often find themselves facing recalcitrant IHS or BIA officials unwilling to abide by tribal court orders. In the absence of clear direction from Congress, BIA and IHS have "interpreted" regulations so as to undermine the effectiveness of tribal court orders. We suggest that one function of the Office of Tribal Justice Support which can and should be conducted within the BIA is to work with the various federal agencies to ensure greater support and assistance to tribal courts and their decisions.

#### c. Clearinghouse

Some of the functions proposed for the Office Clearinghouse are already provided by Indian organizations. For example, the American Indian Resource Institute publishes the Indian Law Reporter. The Bill should be amended to ensure that tribal organizations already supporting tribal justice systems can receive federal funding to improve their services. The Indian Law Reports should be computerized and made more accessible to the various tribal justice systems. The BIA should not be asked to provide duplicative services. We also recommend that the Bill authorize funding to the National American Indian Court Judge Association, the National American Indian Court Clerk Association and the Native American Bar Association to support the services these organizations provide for the improvement of tribal justice systems.

#### 2. Section 102 - Survey of Tribal Judicial Systems

The Jicarilla Apache Tribe recognizes the importance that Congress has placed on the survey to determine both the funding formula and future resource needs of tribal courts. For this reason, the Tribe would like further clarification as to the manner in which tribes will be involved in the process of both determining the survey content and its process. Once again, we urge Congress

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to recognize tribal sovereignty and rely on tribal experience in providing the necessary information for the national survey. As noted earlier, the Jicarilla Apache Tribe knows best what its needs are and how to solve them. We believe that the Office should not dictate to Tribes what information will or will not be accepted, but rather invite participation from tribes to submit information on the factors each particular tribe deems important for their tribal justice system. For example, we believe that the Survey should also gather information on the history of federal funding; the incidence of reported federal crimes, and the incidence of non-reservation businesses and populations subject to the jurisdiction of the courts while on the reservation.

### 3. Base Support Funding And The Funding Formula

The Jicarilla Apache Tribe believes that equitable apportionment of funding among the tribes should be a primary goal of this Bill. As noted earlier, federal funding of tribal courts has too often been subject to the arbitrary decision making process of the BIA. The BIA has based funding on historical patterns of funding rather than true need. For this reason, the development of some type of fair and equitable funding formula is useful. However, the Jicarilla Apache Tribe objects to the implementation and use of caseload standards to determine the funding formula as contemplated in § 102(c)(2). The Tribe objects to caseload standards for two reasons: first, the imposition of these standards impinges upon sovereign authority to determine the form and structure of its tribal justice system. The standards will be adopted with reference to standards used by the federal and state courts and the American Bar Association. These courts are of necessity uniform. But tribal justice systems are as diverse as the tribes themselves. Attempts to impose caseload standards adopted by the Secretary assumes a uniform manner of administering justice and obliterates the important distinctions and traditional elements present in tribal justice systems. Second, caseload standards do not accurately reflect funding needs. Our trial court is increasingly using what is now known as "alternative dispute resolution" mechanisms and traditional methods for resolving disputes before a case is actually filed. These ADR and traditional mechanisms are often more labor intensive than the standard court filings. However, they usually produce better results. Caseload standards simply will not reflect these distinct methods of resolving disputes and tribes should not be penalized in the funding formula for being innovative or using traditional dispute resolution mechanisms.

We also urge Congress to recognize that many tribes require federal funding beyond what might be needed to simply operate a



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justice system on a yearly basis. These courts have not had funding in the past and will need to build the necessary infrastructure to ensure the efficient administration of justice.

Finally, it is our understanding that § 103(c)(3)(f) includes recognition of isolation factors, infrastructure needs and innovative and alternative dispute resolution programs.

In closing, the Jicarilla Apache Tribe supports this Subcommittee's initiative in authorizing much needed funding for tribal justice systems. We believe that the authorized sums are much too low to accomplish the goals of the Bill. We also ask the Subcommittee to amend the Bill to streamline the functions of the Office of Tribal Justice Support and to eliminate the use of caseload standards as a means of funding tribal justice systems.

Mr. FALEOMAVAEGA. Thank you.  
Judge Yazzie?

### STATEMENT OF HON. ROBERT YAZZIE

Mr. YAZZIE. Mr. Chairman, since our time is limited, I will get to the point. My name is Robert Yazzie. I am the chief justice for the Navajo Nation. The position of the Navajo Nation is to reject H.R. 1268.

Yesterday I appeared before the Senate committee to tell it that, among other things, most tribal leaders want what was in last year's Senate bill, S. 1752. It replied, "We want what the Indian country wants. You should go and speak with the House."

I spoke with the Navajo Nation, our president, Peterson Zah, and he supports this position.

It is our decision to stick to our guns, and that is why I am here today. We spoke with approximately 75 Indian judges at its annual meeting here in Washington, and most of them are here in this room. We hear the following:

No. 1, we prefer the concepts of S. 1752;

No. 2, we do not want the BIA to have more control over us;

No. 3, we don't want more power for the BIA; and

No. 4, the BIA has never helped us; we can't expect it to in the future.

Most of all, we badly need more money now. This bill is unacceptable. Federal agencies have no role in making Indian court policy. This bill would allow the BIA to impose standards on us, despite the language not to do so.

Control of the purse strings includes control as to how the money is spent. That is aside from the fact that the BIA keeps 75 cents of every Indian dollar appropriated. The BIA record is poor. It never gave us the resources to implement the 1968 Indian Civil Rights Act. It never followed through with a prior plan to give tribal courts data systems. It never implemented the 1968 Judges Association study on tribal court needs.

When you look closely at this bill, at what this bill actually does, it could have been accomplished with regulations under existing law.

We want one national Indian judicial conference. It would get things done because it would be in the interests of Tribes to get what they need. It would target what we need to get the job done. It would give Congress direct access to the leadership of Indian country.

We want one unified national Indian judicial conference. What is it? A national body, like ones with the Federal, State, and administrative law judges, which adopts policy, identifies needs, communicates those needs to funding sources, and directs the methods of allocating funds.

We do not want a tribal court law which promotes the practice of "divide and conquer." I am here again today to tell you we want what was in S. 1752. If it is not acceptable to this committee, we want no bill which has Washington telling us how justice programs will be run. Whether we have a tribal court bill or not, we want and must have a significant increase in funding immediately. The tribal courts have been in a state of emergency for some time, and

we are suffering. Tribal judges are so broke they can't pay attention.

As a compromise, if we need an authorization bill, I propose the following. Strike everything after the title and substitute the following language. "The Bureau of Indian Affairs shall within 90 days of enactment promulgate regulations to implement this act consistent with the sovereignty, independence, and integrity of Indian nations." That there be language which says there are authorized to be appropriated to carry out this act \$75 million to each of the following fiscal years. 1994, 1995, 1996, 1997, 1998, 1999, and the year 2000.

Thank you.

[Prepared statement of Mr. Yazzie follows:]

SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
COMMITTEE ON NATURAL RESOURCES  
UNITED STATES HOUSE OF REPRESENTATIVES

TESTIMONY OF THE NAVAJO NATION

on

H.R. 1268, THE "INDIAN TRIBAL JUSTICE ACT"

by

The Honorable Robert Yazzie  
Chief Justice of the Navajo Nation

April 21, 1993

## INTRODUCTION

Mr. Chairman and members of the Subcommittee on Native American Affairs (SNA), the Navajo Nation appreciates this opportunity to provide our concerns regarding the tribal court legislation, H.R. 1268. I am Chief Justice Robert Yazzie of the Navajo Nation Judicial Branch, presenting these views on behalf of the Navajo Nation. This testimony is supported by the Judiciary and Intergovernmental Relations Committees of the Navajo Nation Council.

Legislation for tribal justice is vital to tribal sovereignty. In this context, "sovereignty" means independence and integrity, and freedom from outside interference or control. Sovereignty also means tribes being able to provide complete justice to all plaintiffs and defendants who appear in our courtrooms.

H.R. 1268 is not the first tribal court enhancement bill we have seen. Over the past five years, the Navajo Nation has discussed and reviewed tribal court legislation beginning with the January 1988 oversight hearing of the Senate [Select] Committee on Indian Affairs (SCIA). This is my fourth appearance to testify on tribal court legislation.

In February 1993, tribal judges, American Indian organizations, and I met with Chairman Daniel K. Inouye and urged him to reintroduce the text of last year's Senate tribal court bill, S. 1752. We are deeply disappointed this has not happened. Neither S. 521 introduced by Senator John R. McCain (R-Ariz.) nor H.R. 1268 incorporates the recommendations made by tribal judges these last five years. Please recall that last year's Senate bill had overwhelming tribal support. H.R. 1268 is a marked departure from the consensus bill of last year.

I testify before this Subcommittee seeking assurances that tribal court legislation must appropriate significant additional monies for Indian justice - without delay, provide tribal courts the resources to protect civil rights, and reinforce tribal court independence and integrity - not strengthen federal control over tribal courts.

## LACK OF TRIBAL COURT FUNDING AND BIA ACCOUNTABILITY

In 1977, the American Indian Policy Review commission published findings on civil and criminal justice in tribal courts. In their report the Commission recommended that "Congress appropriate significant additional monies for the maintenance and development of tribal justice systems: Funding be direct to tribes...." In 1991, the United States Commission on Civil Rights concluded that the primary obstacle to civil rights in Indian Country is the failure to give Indian courts the resources they need. When Congress overruled Duro v. Reina a few years ago, it concluded that Indian courts must have funds to carry out their responsibilities. Yet, to date, Congress and the BIA have not appropriated

additional or sufficient monies for tribal courts. Federal funding was only 21% of our tribal court budget in fiscal year 1992, and 15% in 1993. We do not expect any increase in fiscal year 1994.

In addition to lack of resources, tribal courts are forced to rely on the BIA. The BIA has a record of almost 60 years, since the Indian Reorganization Act of 1934, of failure to support tribal justice. In January 1988, the Senate [Select] Committee on Indian Affairs recommended that the BIA develop a funding formula for tribal courts. To date, the BIA has not established this funding formula. Further, Congress has enacted several laws that positively impact tribal governments and courts, but the BIA continually fails to request authorized funds or asks for limited amounts. Tribal courts are at a critical juncture. Simply relying on the BIA will not answer our needs or problems.

## CIVIL RIGHTS

Non-Indians use civil rights as their pretense to attack tribal courts. Yet, the civil rights debate ignores the rights of poor people to access courts for speedy, inexpensive, and fair due process of law. Insufficient resources in current tribal court systems limit the right of economically deprived individuals to access the courts for their fair trial. For example, in our fiscal year 1992, beginning April 1, 1991 and ending March 31, 1993, we handled 85,000 cases. Ninety-three per cent (93%), or 79,000, were criminal cases. 5,000 cases mostly involved child abuse or neglect, delinquency, and family disputes. 3,480 cases involved drunk driving. Of the 79,000 criminal cases, 20 probation officers handled approximately 4,000 cases each and most of the criminal cases were alcohol-related. We need more tribal judges, probation officers and court staff to handle our overwhelming caseloads.

It is the rights of victims of crime, and people who are victimized by circumstances to look to a tribal court for protection. As things now stand, we cannot keep up with the public demands to serve all victims of these offenses. The key to this bill is people. Congress should honor its constitutional obligation to Indian justice by providing adequate resources and funding for tribal courts. In doing so, I firmly believe we can better serve all persons who come into contact with Navajo courts.

We also are concerned about the rights of defendants in criminal cases, as we have provided for them in our tribal law. Now, we stress the rights of victims, and the rights of criminal defendants as the victims of their circumstances. But, we can only provide limited service to these victims because of our limited tribal court budget.



## APPROACH TO TRIBAL COURT FUNDING

H.R. 1268 (and S. 521) both establish an Office of Tribal Justice Support (the Office) within the BIA. We have several concerns about this. First, the BIA's service to tribal courts, as stated above, is inadequate. The BIA has not capitalized on previous recommendations to enhance tribal courts by tribal judges, leaders and organizations. The BIA has always ignored recommendations and advice of tribal judges on improving tribal courts. For example, the Judicial Services Branch in studying tribal court assessment standards did not seek our input. These BIA assessment standards have only interfered with our court systems. Second, the function and operation of the proposed Office is unclear. Third, and most importantly, BIA control of technical assistance functions, including monitoring grants and contracts limits tribal courts from effectively managing their own operations.

Currently, the BIA is managing special tribal court grant and judicial education programs without regulations, contrary to federal law. The BIA has managed these funds inappropriately which has hindered the effective operation of tribal courts. History shows that the BIA cannot provide the support we need, therefore, the BIA should not gain control over tribal courts through the proposed Office of Tribal Justice Support.

## THE TRIBAL JUDICIAL CONFERENCE

The proposed tribal judicial conferences in H.R. 1268 (and S. 521) are a means to divide and conquer tribal governments. Both bills allow tribes the option of either contracting directly with the Office, or participating in a tribal judicial conference and then contracting with the BIA. This option for tribes to participate or not participate in a tribal judicial conference may cause disunity between tribes. Further, the legislation assures that there would be no unified national tribal voice. We in Indian country can not afford such divisiveness. Further, the proposed authorization levels of funding for the tribal judicial conference in H.R. 1268 (and S. 521) is wholly inadequate.

The Navajo Nation supports one national tribal judicial conference that is tribally created, under the effective control of tribal governments and responsible for justice initiatives identified by tribes. The concept of a national Indian judicial conference is the same as the examples of the Judicial Conference of the United States, the Conference of State Courts, and the national conference of administrative law judges. Those bodies work together to draft court policies, set needs and priorities, and work with Congress. A judicial conference is the means for judges in a legal system to develop comprehensive approaches to justice

functions, assess needs, and communicate directly with bodies such as Congress. A comparable national Indian judicial conference that would regulate tribal courts overall, in place of BIA, is necessary in order for tribal courts to function properly.

## CONCLUSION

We supported the Inouye-McCain tribal court bill, S. 1752 of last Congress. It remains the best legislative proposal. It is what we want. A national tribally sanctioned Indian body should control tribal court programs and keep the federal presence to an absolute minimum. The approach taken this Congress reinforces the BIA, although we are in an era when self-determination is overtaking BIA control. Why should tribal courts succumb to BIA control and standards? Our major concern is that the BIA will impose court standards on our tribal system at a time when we are developing our own innovative and traditional approaches.

I hear over and over again from the Indian authorizing Committees that any Indian bill, let alone tribal court bill, must be "Indian Country's" bill. We in good faith believed and trusted that the Congress understood our position--recorded and developed since 1988--that adequate resources, tribal services and judicial integrity were the bench marks. We believed we achieved this in S. 1752 of last year. But, here I am, again, revisiting what had previously been decided and agreed to - or so we thought.

Chairman Richardson and members of the Subcommittee, I urge you to carefully craft tribal court legislation comparable to S. 1752 that will give tribal courts the necessary resources to preserve American Indian families and assure that every person in Indian country has access to tribal judicial relief that is prompt, equal and fair.

## ATTACHMENT A

## PROFILE OF THE COURTS OF THE NAVAJO NATION

**POPULATION:** 200,000. 1990 Census - 148,451 persons. Indian population 143,405 (96.6% of total). Largest Indian tribe in population.

**AGES & GROWTH RATE:** Median (mid-point) age is 18.7 years. 52% are age 19 and under. Annual growth rate is 2.31% (0.989% for the U.S.), 23.% per decade. Age cohorts:

0-19	-	9 %
10-19	-	25%
20-24	-	9%
25-34	-	13.5%
35-44	-	9.5%
45-64	-	11%
65 +	-	5%

**EMPLOYMENT AND INCOME:** (Bureau of Indian Affairs, Indian Service Population and Labor Force Estimates, December 1991) 74% of the population is out of the work force due to age, inability to work (children or disabilities), or unable to find work. 43,026 (26%) in work force - 32,616 (24.2%) earn less than \$7,000 per year.

Population (1991)	165,086	
Under age 16	45,098	(27.3%)
Unable to work	27,355	(16.6%)
Able to work, unemployed	49,719	(30.1%)
Employed	43,026	(26.0%)
Earn more than 7K	32,616	(29.8%)

**TERRITORY:** 17,202,118.21 acres or 27,523 square miles in Arizona, New Mexico and Utah. Navajo Nation is 19 square miles larger than Ireland; larger than West Virginia, and slightly smaller than South Carolina (40th State in size).

**CREATION:** Originally established as the Navajo Court of Indian Offenses in 1892. Created as the Courts of the Navajo Nation, April 1, 1959.

**COURT STRUCTURE:** Unitary system, with seven judicial (trial) districts and one court of last resort, the Supreme Court of the Navajo Nation. Each district has a district and family court. There is a traditional Navajo Peacemaker Court, with 227 peacemakers in 89 local governmental districts (chapters).

**LAW APPLIED:** (1) Applicable statutes and laws of the United States, (2) Navajo Nation statutes, (3) Navajo common law (as the law of preference), and (4) (where no other applicable law) law of the State where the action lies.

**JUDGES:** 14 district and family court judges (7 women). Three justices of the Navajo Nation Supreme Court. Chief Justice has supervisory and administrative authority.

**COURT PERSONNEL:** 135 support employees-

administration	10
bailiffs	7
clerical	17
court attorneys	5
court clerks	38
financial	3
probation	20
other	18

BUDGETS:	FY 1992	FY 1993
Navajo Nation general fund	\$3,696,000	\$4,234,858
Federal "638" funding	856,308	740,000
Special Tribal Court funds	135,000	-0-
Other grant funds		20,000
Total funds:	\$4,687,308	\$4,974,858

**CASELOADS:** FY 1992 caseload of 85,014 matters. 58,005 (68.2% of caseload) filed, 27,009 (31.7%) brought forward, and 42,387 (49.8%) closed. 42,627 cases (50.2% of caseload) carried forward into FY 1993.

**CRIMINAL CASES:** 24,182 filed (42.5% of total caseload). Major offense categories:

Offenses against the public	12,390	(51.2%)
Intoxicating liquor violations	3,176	(15.3%)
Offenses against persons	2,617	(10.8%)
Obstruction of justice	1,115	( 4.6%)
Offenses against the family	1,096	( 4.5%)

**TRAFFIC CASES:** 29,878 filed (40.9% of total caseload).

General vehicle violations	22,124	(74.0%)
Vehicle equipment violations	4,267	(14.2%)
Driving while intoxicated	3,480	(11.6%)

**JUVENILE OFFENSES:** 799 delinquency cases file (1.2% of caseload).

Major youth offenses:

Public intoxication	165	(20.6%)
Assault & Battery	114	(14.2%)
Disorderly conduct	92	(11.5%)
Property damage	84	(10.5%)
Theft	49	( 6.1%)

**CHILD WELFARE CASES:** 378 child welfare actions (> 1% of caseload).

Top five categories:

Physical abuse and neglect	174	(46.5%)
Guardianship	74	(19.5%)
Adoption	39	(10.3%)
Termination of parental rights	25	( 6.6%)
Indian Child Welfare Act transfers	23	( 6.0%)

19 cases (5%) involved child sexual abuse.

**CHILD STATUS OFFENSES:** ("Child in Need of Supervision") 209 CHINs petitions (> 1% of caseload):

Traffic citations	209	(63.9%)
Beyond control of parents	97	(29.6%)
Truancy	20	( 6.1%)
Other ( > 1%)	1	(> 1.0%)

**DOMESTIC RELATIONS:** 495 actions (2.1% of total caseload) with the major five categories of:

Divorce	495	(36.6%)
Change of name	228	(16.8%)
Other family cases	193	(14.2%)
Probate	99	( 7.3%)
Enforcement of decree	87	( 6.4%)

**CIVIL ACTIONS:** Civil actions, other than family matters, 1,191 (1.9% of the caseload). Major five categories of civil actions:

Contracts	682	(57.2%)
Various civil actions	363	(30.4%)
Torts and personal injuries	56	( 4.7%)
Land disputes	49	( 4.1%)
Equitable and injunctive relief	37	( 3.1%)

There were three civil rights actions and one prisoner habeas corpus petition.

**RESOURCES NEEDED AND COST:**

Judicial complex and court facilities	\$12,000,000
Additional personnel for public access	1,199,979
Equipment	833,850
Supplies	61,000
Other needs	123,035
<b>TOTAL:</b>	<b>\$14,217,864</b>



Mr. FALCOMA. Judge Yazzie, what do you think of a bill that says, "The Bureau of Indian Affairs within 90 days shall hereby be terminated and that the \$1.2 billion be given to every Tribe proportionately to its needs"? I am just offering that as a suggestion.

Judge Coochise?

#### STATEMENT OF HON. ELBRIDGE COOCHISE

Mr. COOCHISE. I don't think you want an answer to that question. [Laughter.]

I am Judge Elbridge Coochise from the Northwest Intertribal Court System, which provides services to 15 small Tribes in western Washington State.

Mr. Chairman and members, I am honored to be present before you today to make comments on behalf of the Northwest Intertribal Court System regarding H.R. 1268, the Indian Tribal Justice Act. I have submitted written testimony for the hearing, and I hope that it will be included as part of the record. So I will summarize our recommendations.

We have been involved all previously on the Senate side as well as looking at some of the House versions. The proposed legislation is not as comprehensive as the previous legislation that was proposed on the Senate side. We have certain concerns and recommendations that we would like to make.

We do agree and support the findings and declarations of the bill itself. We strongly support and agree that no standards or anything will be imposed on Tribal Governments and tribal courts.

With all due respect, we are concerned in this proposed legislation that it is taking several steps back from what was previously proposed in the Senate version, S. 1752. And our concerns are principally that a distinct majority of the Tribes supported that proposed legislation and had ample opportunity to participate in the development of the provisions of the previous bill.

To expect from the Congress or the Federal Government that tribes should reach consensus on any tribal courts legislation, to me is outrageous when in this democratic society the majority rules, and certainly there has been a distinct majority who supported that legislation and the concepts.

And we are always being admonished or required to go to a higher standard than you impose on other outside entities, such as in State courts. There have been proposals for ethics and standards required for tribal courts higher than State courts are required to live under. And we have seen that a number of times.

There are two major concerns in this bill. First, of course, is the adequate funding. Tribal judiciaries are vital to the maintenance and the enhancement of tribal sovereignty. Therefore it is essential that Tribal Governments receive adequate funds for their judicial systems.

The concern here is limiting Tribes to only one entity within the Federal system, the Interior Department, for appropriations. I think this is wrong. As tribal sovereigns and governments, they should be entitled to all access to the Federal appropriations agencies throughout the Federal system.

We always make Tribes only required to come to Interior, and I think as any government, from the outside, including those foreign governments, they are not limited, and generally they will usually get funding from different sources.

I agree with the Bureau's statement that they will be putting us to compete with Indian monies for other programs, and there is just not enough money there at all. But to tie them down into one appropriations committee I think is wrong, and should not be imposed on Tribal Governments who are sovereign, and they should be allowed to have access.

The other major concern is in relation to the judicial conference. While in this bill you have provisions that would provide for one or more, in the previous bills that was also a problem. So there are concerns there. Our position is that any judicial conference should be created in form and substance by Tribes themselves.

I do take a point, though, on Congressman Thomas' statement that if the Tribes wanted to form a judicial conference, they should do it with their own money. I think we have, as Indian Governments, paid our dues well beyond any other agency, and we now expect the Federal Government to live up to its treaty obligations and trust responsibilities.

And we do make one major recommendation, as my colleagues here have. We are talking here about funding resources that we need. This bill in itself does not in any essence constitute a justice act. There are not enough provisions in there to consider it a justice-entailed act. The title should automatically be changed to the "Tribal Courts Emergency Funding Act."

We oppose the establishment of the office in the Interior, and we strongly urge the current BIA Judicial Services' role be limited as a conduit for appropriated funds so that the funds actually get there. We have seen numerous times appropriations, and a minute amount of that funding gets to the tribal level.

I want to answer additional questions, but I can answer where the \$50 million figure came from. That came from a recommendation from my testimony from the National American Indian Court Judges Association, based on recommended base funding of \$150,000 per court, no matter what it is. And that's where that figure came from.

You have my other recommendations on record, and I see my time is up.

[Prepared statement of Mr. Coochise, and document entitled "BIA Budget Justification Estimates—Tribal Courts" follow:]



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ELBRIDGE COOCHISE  
Administrator & Chief Justice

**Statement of Elbridge Coochise, President  
Northwest Intertribal Court System  
Before the  
House Subcommittee on Native American Affairs  
on  
"Indian Tribal Justice Act"  
H.R. 1268**

**April 21, 1993**

Mr. Chairman and Members of the Committee, I am honored to be here today to present comments on H.R. 1268, the Indian Tribal Justice Act.

The proposed legislation, while not as comprehensive as the recent Senate legislation of last session, S.1752, is a step toward our primary concern of adequate funding for Tribal Courts.

We have certain concerns and recommendations for any Tribal Courts bill.

We agree and support the findings and declarations that: there is a government-to-government relationship between the United States and each Indian Tribe; self-determination, self-reliance, and inherent sovereignty of Indian Tribes is supported by statutes and Treaties; that Indian Tribes possess inherent authority to establish their own form of Government and Tribal justice systems; that Tribal justice systems are essential to self-government and integral to the fulfillment of the self-determination policy; and, that Tribal justice systems are inadequately funded and this lack of funding impairs Tribal ability to administer justice effectively.

The Tribal Courts, as the third component of Tribal governments, serves as the provider of justice for Tribes in their exercise of the power of Self-Government. The Tribal Courts, as the protector of the Indian Civil Rights Act provisions, can only guarantee those rights with adequate resources. As an integral part of the exercise of sovereignty and providing justice, the Tribal Courts are the balancing entity charged with assuring that justice is carried out for the Tribes and its people.

This legislative funding authorization, if enacted, will go a long way in providing for the inadequacies of financial resources to the Tribes for their judicial systems. With the increase in number and complexity of cases, and the mandates of the Federal Courts in the exhausting of Tribal Courts remedies, it is essential that the inadequacies of funding for Tribal Courts be resolved. Only with adequate resources to Tribal judiciaries will the Tribal justice systems become strong, independent systems further strengthening the sovereignty of the Tribes.

We support base funding for each Tribal justice system, based on their need as determined by the Tribal government with their judiciaries. It is imperative that full participation of Indian Tribes with the Secretary of the Interior, be honored in the development of an appropriate allocation formula which establishes base funding for each Tribal justice system, and ensures equitable distribution of funds. The \$50 million authorization for base funding for seven years, beginning in FY94 for the approximately 170 Indian Court systems, would more realistically meet the needs of the Tribal Court systems. The \$7 million separate authorization, among other purposes, should be added to the above base to assist judges and court personnel in training, automation, record keeping and overall improvement of court operations.

We strongly agree and support Title I, Section 101(d): that the Act will not impose any standards. Nothing in this Section shall be deemed or construed to authorize the Office to impose justice standards on Indian Tribes.

We are concerned that this proposed legislation is taking several steps backward from the previously proposed legislation (S.1752) of the Senate. Our concerns are principally that a distinct majority of the Tribes supported S.1752 and had ample opportunity to participate in the development of the provisions in that bill. Part of our concerns are that several fundamental and progressive concepts embodied in S.1752 are not in this proposed legislation.

Several of these issues include: the limiting of funding authority to only the Department of the Interior with the obvious exclusion of financial support from the Department of Justice; the base level of funding not being based on equivalency to State courts of general jurisdiction performing similar functions in the same or comparable geographic regions; no protective provisions that any standards developed under the Act are not to be imposed on a Tribal Court except by the Tribal government; no appeal procedures for Tribal governments who feel slighted by the formula and level of funding received; funding for intertribal appellate courts is not included; no provisions to assure a right to counsel as defined by Tribal law; no provision that Federal funding to courts be administered in a manner that encourages flexibility and innovation by Tribal judicial systems and that avoids encroaching on Tribal traditions that may be manifested in Tribal Judicial systems, and assuring the protection of the diversity of Tribal Court systems; and, most critically a mandate that funding for Tribal judicial systems be in a manner that will

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minimize Federal and administrative costs; no provision that encourages the mutual recognition by Tribal, State and Federal courts of the public acts, records, and proceedings of each other's courts.

Tribal judiciaries are vital to the maintenance and enhancement of Tribal sovereignty. Therefore, it is essential that Tribal governments receive adequate funds for their judicial systems. By limiting appropriations for Tribes' judicial systems to the Interior Department (BIA) presents two very real problems: (1) that the Tribal Courts would compete with other Tribal programs for limited BIA funds, and; (2) that Tribes would not have access to logical Federal support resources in the Justice Department. Tribes, as sovereign governments, should be allowed to access all Federal resources that could improve their operations. Limiting funding to only the BIA and excluding access to the Justice Department is difficult to support. The Trust Responsibility is with the United States, not specific Departments or Agencies.

The other concern involves the Tribal Judicial Conference. In S.1752, there was concern by some Tribes that this provision would mean a proliferation of Judicial Conferences even though the bill stipulated only a national conference. This legislation under consideration actually will allow many judicial conferences to be created at regional, local and national levels since it will take only two or more governing bodies of Indian Tribes to establish a judicial conference. We do agree and support the notion that Tribal Judicial Conference established by Tribal governments and authorized by the Tribal governments shall be considered a Tribal organization, not a Federal entity. These Judicial Conferences should also be authorized to receive funds and perform any or all of the duties of the Bureau of Indian Affairs and Office that will be created under this Act, as proposed in S.521.

We are concerned that this proposed legislation does not offer the breadth of Tribal Court advancements contained in previous proposed bills, although this bill would authorize the same level of funding. In order to achieve a solid enhancement of Tribal judicial systems, settling for a less detailed bill may hinder fundamental improvements authorizing Tribal control and authority while reducing the Federal bureaucracy.

We do commend Congressman Bill Richardson and Congresswoman Karen English for their efforts and their for Tribal Courts. We urge the Subcommittee on Native American Affairs to get a bill passed on behalf of Tribal Courts. We understand the compromise realities represented in this bill, but we encourage inclusion of amendments that would more accurately reflect a clear majority of Tribes recommendations. We contend that a Tribal Court's bill must be an "Indian Country bill".



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We make the following recommendations:

- (1) That the title be changed to the "Indian Tribal Courts Emergency Funding Act".
- (2) We oppose the establishment of an Office of Tribal Justice Support in Title I, Section 101(a). We oppose the automatic transfer of existing functions and personnel of the Branch of Judicial Services to a newly created Office. We strongly urge that the current BIA Branch of Judicial Services, only be a conduit for appropriated funds and remain operable under the BIA.

Several justifications for these recommendations are: (1) Tribes should be allowed to control and direct any Office; (2) Any Office should be directly accountable to the Tribes; (3) Federal and administrative costs should be minimized; (4) Any entity should serve an advocacy role for Tribal Courts funding and needs; and, (5) There would be better assurance that the appropriated funds reach Tribal levels.

- (3) The base funding level should be established at a minimum for any Tribe at \$150,000 and increased from that amount based on allocation formula criteria.
- (4) The funding authorization, Section 301(b), should be increased to \$75 million to recognize the court needs of the many Alaska Native government entities. The base funding level at \$150,000 per Tribe would not be sufficient under the proposed authorization when the current 170 Tribal Courts expand to include some 210 Alaska Natives villages.
- (5) The formula criteria of Section 103 C(3)(B) population to be served, should include population of both Indian and non-Indian on reservation and off reservation (i.e., in civil cases and usual and accustomed jurisdiction).
- (6) The Tribal Court base level funding should be equivalent to State courts of general jurisdiction performing similar functions in the same or comparable geographic region.
- (7) An appeal process should be established in the legislation for Tribes who contend inequitable treatment.
- (8) Intertribal appellate courts should be included under the definition of "Tribal Justice System". Intertribal appellate court systems funding should be authorized.
- (9) A clear legislative safeguard should provide that there will be no imposition of Federal law, meaning the "Separation of Powers", on any Tribal government.

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- (10) The bill should clarify that Federal funding should be made to Tribal governments for Tribal Courts in a manner that minimizes Federal and administrative costs and in a manner that encourages flexibility and innovation by Tribal judicial systems. This funding must avoid encroaching on Tribal traditions, and should protect the diversity of Tribal Court systems.
  - (11) Federal funding to Tribes should be specifically earmarked for Tribal Court functions and operations. There should not be discretion to divert these funds to other unrelated purposes.
  - (12) Tribes should be eligible for Federal funding from other Federal Departments and Agencies, including the Justice Department. Tribal governments should have access to Federal resources and assistance available to all other units of government in America. As currently crafted, the legislation continues to force Tribal Court funding to compete with all other Indian programs in the overburdened and under-funded BIA.
  - (13) The legislation should include a provision stipulating a right to counsel as defined by Tribal law.
  - (14) A provision should be included that encourages mutual recognition by Tribal, State and Federal courts of the public acts, records and proceedings of each other's courts.
  - (15) The bill should clearly note that no standards developed will be imposed on any Tribal Court except by its Tribal government.
  - (16) A provision of a disclaimer should be included: that the Act will encroach upon or diminish in any way the inherent sovereign authority of each Tribal government to determine the role of the Tribal Court within the Tribal government to enact and enforce Tribal laws; or diminish in any way the authority of Tribal governments to appoint personnel; nor impair the rights of each Tribal government to determine the nature of its own legal system or the apportionment of authority within Tribal government; nor alter in any way traditional forums; or, to imply that any Tribal Court is an instrumentality of the United States; nor diminish the trust responsibility of the United States to Indian Tribal government and Tribal Court system of such governments.
  - (17) There is a great deal of interest and discussion of a Tribal judicial conference in Indian country. This is properly a Tribal concern for both creation and form. Let us defer Federal legislation on a judicial conference for now.

Testimony of Judge Elbridge Coochise  
Northwest Intertribal Court System

April 21, 1993  
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We urge the passage of Tribal Court Improvement legislation to include our recommendations so that our Tribal judicial systems will be afforded the realistic and needed capability to provide the necessary justice forums for our people. An effective, efficient Tribal justice system will obviously strengthen Tribal sovereignty.

Thank you for the opportunity to provide comments on the legislation.

**BIA BUDGET JUSTIFICATION ESTIMATES  
TRIBAL COURTS**

	Special Tribal Courts	Judicial Service Center	Tribal Courts Tribe/Agency
FY93	1,983,000.		13,061,000. (-\$99,000 from FY92 enacted)
FY92	2,008,000.		10,961,000. (-\$954,000 from FY91 enacted)
FY91	1,568,000.	660,000.	10,643,000. (+\$49,000 from FY90 enacted)
FY90	2,065,000.	560,000.	9,542,000. (-\$102,000 from FY89 enacted)
FY89	2,065,000.	139,000.	9,650,000. (-\$135,000 from FY88 enacted)
FY88	2,391,000.(enacted)	359,000.(enacted)	9,256,000.(enacted)
FY87	1,391,000.		9,119,000.
FY86	1,029,000.		10,598,000. (+\$2,312,000 incl. CSF redist.)
FY85			8,286,000.(enacted)

TRIBAL COURT BUDGET  
(One judge court)

## PART I, PERSONNEL:

Judge	\$60,000	
Court Clerk	24,000	
Secretary	20,000	
Law Clerk	24,000	
Prosecutor	31,000	\$159,000
Fringe Benefits 30%	47,700	<u>47,700</u>
Total Personnel Costs .....		\$206,700

## PART II, OPERATIONS:

Audit	\$ 2,500	
Copying \$318/mo X 12 months	3,816	
Office Space/Rent \$12/sq.ft.X 1500 sq.f	18,000	
Postage \$100/mo X 12 months	1,200	
Supplies \$350/month X 12 months	4,200	
Telephone \$350/month X 12 months	4,200	
Travel \$400/month X 12 months	4,800	
Training, legal Education	5,584	
(1,500 + 1,300 + 995 + 940 + 940)		
Total operations costs.....		<u>\$44,300</u>
TOTAL TRIBAL COURT COSTS.....		\$251,000

## Tribal Trial Court Costs

169 Indian Courts at 251,000 per court	
(a one judge court)	
\$251,000 X 169 courts =	\$42,419,000

If public defender services are to be included:

Public Defender	\$30,000	
Fringe Benefits 30%	<u>9,000</u>	
	39,000	
\$39,000 X 169 courts =		<u>6,591,000</u>
		\$49,010,000



Mr. FALCOMA. Well, you gentlemen have certainly provided for the committee some very comprehensive thoughts on the issues, and I will say quite candidly it will not make it any easier for the subcommittee to consider or review again the provisions of the proposed bill now pending before the House.

A question to Judge Yazzie. You had recommended that we set up only one judicial conference, but how will this meet the needs of other Tribes that may not have the fully functioning aspects of a three-branch system, as perhaps the Navajo Nation currently has? I mean how would you accommodate their needs if this is not currently being used or utilized under the tribal systems?

Mr. YAZZIE. The one judicial conference will definitely meet the needs of all the tribal courts. We have 170 tribal courts across the country, and each will have a voice in the conference as to what the policies should be, what the formula should be, and it will address their needs to the judicial conference.

The judicial conference will not be to impose anything. If there is a survey to be done, it will be done with the participation of the 170 tribal courts. And there is a mistaken notion that this judicial conference will be a separate agency, a separate Federal entity. That is not the case. The judicial conference concept is based upon and rooted in the sovereignty held by the Tribal Government. They will exercise their authority as to who shall participate in the judicial conference.

Mr. FALCOMA. It has been suggested, and correct me if I am wrong, I think as it relates to the Senate version of this whole issue that we are discussing, that the funding or the appropriations process come out of Commerce and Judiciary and State. We have a different system as opposed to how the Senate does its activities as far as the funding process is concerned.

Quite obviously, we are going to definitely end up probably in conference if the House should assert itself as far as passing our version, and as opposed to whatever the Senate may want to do, and we will then probably go through a process really, hopefully, that will come out with some compromises in the process.

As all of you three gentlemen are aware, our procedures are not exactly the same as the Senate, and one of the reasons that we are proceeding with the way the provisions are outlined in the bill is simply because we don't want to end up with having other committees having jurisdiction over this legislation.

I don't know if Judge Yazzie is aware of the fact that under the Senate version it will definitely trigger other committee jurisdiction problems procedurally that we have here in the House, as it is quite different from the way the Senate has its operations and workings.

But I just wanted to point that out for your information. You might have some suggestions of how we might resolve this obstacle or problem that we currently have.

Judge Coochise, and then Judge Yazzie?

Mr. COOCHISE. Yes. In response to that, many of the Tribes that I have talked with and then certainly the courts have said, we don't want to be limited to one, Interior. If it has to go through several committees, then so be it, we are willing to. And certainly they can answer more readily. I talked with their president sometime

last year, and finally he went to a Department of Agriculture for different funding, and he was told, "Why haven't you been coming? Why do you always go to Interior?"

The perception is that we only belong in Interior. For example, I have been requesting to testify in the Commerce and Judiciary Committees. The first thing they said was, "Why are you coming to us? Tribal courts belong in Interior." The government's trust relationship is between the U.S. Government and the Tribal Governments, not BIA agency with the Tribal Governments. If so and that's the case, then they should not be limited to only one appropriations committee.

Mr. FALEOMAVAEGA. So you're suggesting that we currently have a flaw in our own policy as far as if there is a Federal policy—and I am not sure if it's even written by law—that all appropriations dealing with Native Americans should come under just one Federal agency and I can fully appreciate your concern about that. Why should they just come under one Federal agency? Is that what you're saying?

Mr. COOCHISE. Right.

Mr. FALEOMAVAEGA. Judge Yazzie?

Mr. YAZZIE. Mr. Chairman, we can be talking about details—and you have just stated correctly that you don't make our job any easier—we can talk about details of the current bill later. Right now we are in an emergency situation.

I have a suggestion. Why not just give us the money now? Why not tell the BIA, look at the Interior appropriations act and get a line item for the tribal courts? There is not one now. If there is anything, there is only a line item for training, for special tribal courts grant, that's it. Those are given on a competitive basis.

What I am suggesting is that if the committee chooses to create a line item, take it out of the priority system. We don't need to compete. Like I said, 75 percent of the appropriation is spent by the BIA for its overhead. Why not use that 75 percent and give it to the Indian tribal courts to take care of its needs? They don't need 75 percent to operate on to run a business? They can do with less.

Mr. FALEOMAVAEGA. Mr. Vicenti?

Mr. VICENTI. It's going to be difficult to comment on the question. It seems to be blossoming as it makes it this way. But I recognize that there were problems with S. 1752, not so much in the concept that Justice Yazzie is arguing in behalf of. I recognize that there were procedural problems when it came on the House side.

In response to the narrow question as to whether it should go through State, Justice, and Commerce, there are some positive aspects and some negative aspects. The most positive is that they are used to seeing State court budgets, and I would expect that they would have a tendency to expect the funding needs to be the same in a tribal court as there would be in a State court.

The dangers would be that the same committee may want to strap issues about civil rights enforcement onto the question and begin to use their funding power punitively if they don't see tribal courts doing what State courts do. I think that there are ways to get around that, and obviously all of Indian lobbying and legislative history has been one of education. This is, I think, an edu-

cational process that we can somewhat foresee any which way it goes.

Mr. FALEOMAVAEGA. If I were to understand Justice Yazzie's concern, I think the point is well taken. To say it a little more basically, of the \$1.2 billion that is allocated for the Bureau of Indian Affairs, 75 percent of that goes to administrative costs. And I think that is really the bottom-line issue in a situation where it has caused some very, very difficult administrative policy issues affecting the needs of Native Americans for how many years now?

Taking again the recommendation that Justice Yazzie has suggested here, why don't we just scrap both bills and simply make this as a line item appropriation in terms of really the top priority is the money and not the office or all these other things?

Is this what you are suggesting, Justice Yazzie? How much are you recommending? The Administration is recommending \$15 million to meet the needs of the 130 tribal courts that we now have in the country. Do you recommend a higher figure?

Mr. COOCHISE. \$15 million is like a drop in the bucket. Less than that. Yesterday we heard it said by Senator Campbell that the Administration is proposing to give China \$19 million and Russia \$1 billion.

Mr. FALEOMAVAEGA. \$1.6 billion.

Mr. COOCHISE. \$1.6 billion. And how much of that is going to Indian Nations? Zero. And we are talking about a small budget, very, very small. And in the case of the Navajos, we are proposing \$14.2 million. If we were to be allocated that money, it will just exhaust all that BIA has now. And as it is, you heard the director of tribal services say there is a slight increase in the BIA budgets. In our case there was a decrease of what we got this year over last year's fiscal. The amount of decrease, \$116,000.

Mr. FALEOMAVAEGA. Justice Coochise?

Mr. COOCHISE. Yes. I wanted to make a comment regarding the survey. Appropriate money within the Bureau to do its own survey on behalf of the tribal courts, and this is going to happen. It has already happened. I got a call two weeks ago saying, "Give us the stats for fiscal year 1992"—they want us to do it with no more money. They're going to say, "Well, we'll do the survey," but it's going to be us who are sitting on the bench, our clerks, and no more money. We argued that point with them many times in many years on this issue of the tribal courts.

And I have a listing here of the last eight, nine years of funding actually appropriated for tribal courts, and there are no increases. And that is a real concern, that any survey, if there is going to be one, should not be by the Bureau, it should be by an outside entity. And if you're going to put money somewhere, let's get a decent survey that somebody is going to look at other than putting it on somebody's shelf. As stated by the Hopi delegate, there are surveys done, but nobody has even looked at them to follow up on them.

Mr. FALEOMAVAEGA. Well, gentlemen, I want to say that your comments are well taken, and I am sure the chairman is going to seriously consider these options and see what we are going to do and where we're going to go with the proposed bill.

I am certain that he is going to conduct consultations closely with Chairman Inouye on the Senate side and see where we can

come to an agreement in terms of some of the problems that you have indicated.

Thank you very much.

Mr. COOCHISE. Mr. Chairman, may I make one point that I forgot. The Tribes told me to make sure that in this legislation let's defer the judicial conference. Let the Tribes decide if there needs to be more discussion to look at it or not be in this issue because there is some interest and discussion that needs to take place in Indian country. Thank you.

Mr. FALEOMAVAEGA. Thank you very much.

The hearing is adjourned.

[Whereupon, at 2:35 p.m., the subcommittee was adjourned.]



# APPENDIX

APRIL 21, 1993

## ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

### PUEBLO OF LAGUNA

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#### TESTIMONY OF GOVERNOR HARRY EARLY PUEBLO OF LAGUNA

HEARINGS ON H.R. 1268  
"INDIAN TRIBAL JUSTICE ACT"  
BEFORE THE  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES

April 21, 1993

Mr. Chairman and members of the Subcommittee on Native American Affairs, it is a pleasure to come before you today to testify in support of the Congressional initiative to increase funding and resource support to tribal courts. Exactly 11 months ago, the Pueblo of Laguna submitted testimony on this Bill's predecessor legislation, H.R. 4004, asking for major changes to the legislation to ensure that funding would be provided to tribes in the most efficient manner without the imposition of standards emanating outside of tribes or the creation of Congressionally mandated organizations. The Pueblo was pleased that H.R. 4004 as eventually passed by this Committee and the House adopted many of the Pueblo's (and numerous other tribes') suggested changes. H.R. 1268 builds upon the positive aspects of H.R. 4004 and we will continue to support this legislation. However, from the Pueblo's perspective, the Bill still needs improvement to realize its laudable goal of strengthening tribal courts as an essential and critical means of preserving and protecting tribal sovereignty and self-governance.

Before addressing the particular sections of H.R. 1268, the Pueblo would like to review briefly its tribal justice system. The distinct version of a tribal justice system which has evolved at the Pueblo of Laguna illustrates the diversity of tribes and the need to protect that diversity from outside interference.

#### Pueblo of Laguna And Its Tribal Justice System

Six traditional villages make up the Pueblo of Laguna which is located in the Southwest center of New Mexico. The Pueblo adopted its first written constitution in 1908, with subsequent constitutional amendments in 1949, 1958 and 1984. The constitution vests all sovereign powers in the Pueblo Council to be exercised in accordance with the Pueblo's constitution, ordinances, customs and traditions.

Governor Early Testimony  
 April 21, 1993  
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To govern its members and those who come on to the reservation to conduct business, the Pueblo has enacted ordinances for a wide range of activities. These written ordinances complement the culture and traditions by which we are governed. Our laws, traditions and customs are enforced by a combination of traditional dispute resolution forums and a formal tribal trial and appellate court system. We will refer to this entire dispute resolution mechanism as our tribal court system.

The tribal court system consists of (1) the traditional forum within each village for resolution of civil and personal disputes which arise between members of that village; (2) a tribal court of general jurisdiction with a full-time judge for all criminal and civil cases (not resolved in the first instance by traditional village mediation); and (3) an appellate court made up of the traditional cane bearing staff officers of the Pueblo of Laguna (Governor, First Lt. Governor, Second Lt. Governor, Head Fiscale, First Fiscale, and Second Fiscale). Our tribal court system is a reflection of the unique traditions, culture, development and beliefs of the Pueblo of Laguna. To our knowledge, although the Pueblo of Laguna's tribal courts system shares certain elements with other tribes and pueblos, the particular structure is unique to the Pueblo of Laguna.

Our tribal court of general jurisdiction is a court of record and employs a chief judge, a court administrator, two clerks and an adult/juvenile probation officer. Presently, the interpreters volunteer their time and assistance when needed. The court is in dire need of money for a courtroom deputy, process server, prosecutor, and advocates. The Pueblo is interested in instituting an advocate system, but we presently lack the resources to do so. The Indian Pueblo Legal Services provides assistance to petitioners and parties in our court for guardian ad litem procedures only.

The funding and staffing problems are particularly acute given the demands placed on the Pueblo tribal court. A major state thoroughfare crosses the reservation and the Pueblo has one of the country's largest tribally owned manufacturing businesses located on the reservation.

Although the Pueblo of Laguna currently receives funding from the Bureau of Indian Affairs ("BIA") for its tribal court, the Pueblo shares and understands the criticism many tribes direct at BIA for its failure to provide a satisfactory level of funding and assistance to tribal courts. The Pueblo also believes that it is essential to hold BIA to its task and insist that it fulfill its trust responsibility and provide the funding necessary for the full development of tribal courts.



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Comments on H.R. 1268

1. Section 101 - Office of Tribal Justice Support

The Pueblo of Laguna has previously stated that tribal justice systems do not need another or bigger federal bureaucracy, they need additional funding. Despite the gross inadequacies of funding, tribes are running their tribal justice systems. The Pueblo of Laguna knows best what its needs are for its tribal court system, and given adequate resources, how to meet those needs. H.R. 1268 by authorizing the appropriation of \$50,000,000. for direct funding of tribal justice systems begins to resolve this funding problem. The Pueblo of Laguna does suggest that the authorized funding level be increased.

Given the Pueblo's recognized competence and sovereign authority to determine its own tribal justice structure and needs, Congress should ensure that funding is provided to Tribes for their justice systems in the most efficient manner possible. In the absence of direct funding from Congress to Indian Tribes, the Pueblo does not object to the creation of an Office of Tribal Justice Support within the BIA dedicated to running the CFR courts and funding Indian tribes and tribal organizations for tribal justice systems. § 101(c)(2) and (6). However, the Pueblo urges Congress to reduce the scope and responsibilities of the Office and eliminate sections 101(c)(1), (3), (4) and (5) from the Office's functions. The BIA does not presently possess the expertise necessary to conduct continuing legal education and training for tribal court systems or to perform the other listed functions. At the same time, inter-tribal organizations, businesses and other organizations already exist that perform these tasks. Because the training needs cover a vast array of services, it is almost impossible, as well as quite inefficient, to expect a single federal office to acquire all this expertise. In addition, Congress and the Tribes have been careful to avoid the imposition of standards on Indian tribes and their court systems. If a single office is conducting training and proposing model codes for Indian Tribes, the tendency will be to homogenize tribal court systems, in direct contravention of each tribe's sovereign authority and distinct traditions and history.

A better approach is to grant the Office the authority to disperse Section 101(c) funding to tribes under self-determination grants so that tribes can contract with the appropriate organization or business to provide the training. Section 101(e)(2) allows the provision of technical assistance and training

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through grants to Indian tribes or tribal organizations. This referenced section should incorporate and replace Sections 101(c)(1), (3), (4) and (5). Reference to the provision of technical assistance and training through direct services in §101(e)(2) should be deleted.

The Pueblo endorses § 101(d) and the disclaimer that the section should not be construed to authorize the imposition of justice standards on Indian tribes. This disclaimer should be expanded to apply to the entire bill. Furthermore, this section is undermined elsewhere in the Bill. For example, the Secretary is mandated to provide "appropriate caseload standards and staffing requirements for tribal justice systems" in § 103(c)(2). The imposition of universal caseload standards on distinct and diverse tribal justice systems are exactly the type of standards which this Pueblo and many other tribes opposed last year. When the Office begins dictating how many cases must be handled by tribal staff in order to receive funding, it is in effect dictating the manner in which justice is to be dispensed. Some tribal justice systems incorporate traditional forms of dispute resolution which can be quite labor intensive; many of these "alternative dispute resolution" forums do not, because of their nature, result in formal case filings or the public dissemination of the existence of a dispute.

The creation of a clearinghouse is, at first glance, a good idea. However, once again, the BIA is being asked to duplicate existing services. The American Indian Resource Institute already publishes the Indian Law Reporter which gathers decisions of Tribal Courts and those of other courts addressing Indian issues. Rather than duplicate these services, the BIA should be authorized to provide funding to entities like the AIRI to improve the reporter service by computerizing the database, increasing the number of tribal courts submitting decisions, and improving tribal access to the Indian Law Reporter. Finally, the provision of information on personnel and funding for the clearinghouse must remain a discretionary and optional decision of each tribe and its tribal justice system.

## 2. Survey of Tribal Judicial Systems

The Pueblo of Laguna recognizes that it is important to have some of the information called for in the Survey of Tribal Judicial Systems. But surveys regarding Indians typically are not able to present a clear or true picture of the actual circumstances for two reasons. Survey developers don't understand Indian tribes and their workings, and tribes typically have inadequate response to surveys. Care must also be taken so that the survey does not

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interfere with internal tribal decision making processes. Once again, the Office should utilize existing resources. The Pueblo of Laguna already evaluates its own justice system on a yearly basis. The Pueblo of Laguna already has the capability to determine the "resources and funding needed to provide for expeditious and effective administration of justice" on its lands. The Pueblo would be more than happy to share this information with the Office as part of a national survey. By allowing each tribe to provide information it deems pertinent to this national survey, the Office can avoid inadvertently imposing standards of expectations on tribes. The manner in which the survey is constructed will, of course, determine its outcome. Because of the importance the Survey will play in determining funding levels and Office policy with regard to tribal justice funding, the Pueblo is particularly concerned that "consultation" with Indian Tribes involve meaningful participation of tribal leaders and advocates in the development as well as conduct of the Survey. As the Bill is presently drafted, tribal input does not have to be incorporated into the final survey report.

### 3. Base Support Funding For Indian Tribes

The Pueblo believes that the equitable distribution of tribal justice system monies among tribes is an important goal of this Legislation. The Pueblo opposes, however, the utilization of caseload standards developed by the Judicial Conference of the United States, the National Center for State Courts, and the American Bar Association as points of reference. Once again, tribal courts should not be forced to adopt all indicia of "western" court models to receive adequate funding. The standards adopted by state and federal courts do not and cannot reflect the diversity which exists in tribal courts, in contrast to the required consistency of federal courts, for example.

Instead, the Office should rely on needs justification for funding provided by the Tribes themselves. The Pueblo does support a base support funding mechanism for delivering resources to tribal court systems. Small tribes should not have to compete with larger tribes for scarce tribal court resources.

### 4. Tribal Judicial Conferences

Last year, the Pueblo opposed the creation of a Tribal Judicial Conference as contemplated in S. 1752 and the original version of H.R. 4004. The Pueblo does not oppose the authorization of voluntary tribal judicial conferences. Such conferences are already authorized under P.L. 93-638.

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5. Funding Authorizations

As noted, the funding authorizations may need to be increased. The Pueblo also suggests inserting the same language contained in § 301(a) prohibiting the use of monies earmarked for training and technical assistance for administrative purposes in § 103(b) which authorizes base support funding.

In summary, while the Pueblo supports the core of the Bill, we believe that funding should be provided to tribes in as direct and efficient means as possible. We oppose the creation of a large bureaucracy as presently contemplated for the Office of Judicial Support when many of the functions of that Office are already being performed by either the tribes themselves or other competent organizations. The Pueblo opposes the development of caseload standards for tribal courts, either as a means of determining funding or evaluating tribal court performance. Neither Congress, the BIA, nor any outside entity should determine the structure of tribal justice systems. The imposition of caseload standards determines, in many aspects, the structure of the tribal justice system. Once again, we thank you for inviting us to submit testimony on this Bill and look forward to working with you to improve the Bill and pass it into law.

TESTIMONY OF THE CHIEF JUDGE  
OF THE SHOSHONE AND ARAPAHOE  
TRIBAL COURT OF THE WIND RIVER  
INDIAN RESERVATION, WYOMING

HEARING BEFORE THE UNITED STATES HOUSE OF  
REPRESENTATIVES COMMITTEE IN NATIONAL RESOURCES  
SUBCOMMITTEE ON NATIVE AMERICAN AFFAIRS

April 21, 1993

Mr. Chairman and members of the committee on Indian Affairs, my name is John St. Clair, and I have been the Chief Judge of the Shoshone and Arapahoe Tribal Court since it's creation in 1988; and prior to that Chief Judge of the Wind River Court of Indian Offenses since 1983.

I wish to thank the sponsors of H. R. 1268, the "Indian Tribal Justice Act," Chairman Richardson and Ms. English of Arizona.

The Wind River Indian Reservation is in west central Wyoming 3,500 square miles set aside in 1863 and 1868. The Northern Arapahoe and Eastern Shoshone Tribes, (the Tribes) jointly occupy and own it. There are about 6,000 enrolled Arapahoes and 4,000 enrolled Shoshones, many of who live there along with non-enrolled members, members of other Indian tribes, and non-Indians.

In 1992 the Shoshone and Arapahoe Tribal Court processed approximately 3,500 Civil, Traffic, Child Custody, Juveniles, Criminal Misdemeanor, and Appeal cases. The Court was created in 1988 when the Tribes enacted the Shoshone and Arapahoe Law and Order Code, which exerts civil jurisdiction over all persons who have significant contacts with the reservation and criminal misdemeanor jurisdiction over all Indians who commit such crimes on the reservation. The Tribal Court system consists of a permanent Chief Judge who must have a law degree, and three Associate Judges who need not have attended law school. All judges must be tribal members and those not members of a state or federal bar association must pass a test for competence within one year of their appointment.

Major problems have plagued the tribal court and its predecessor the code of Federal Regulations (CFR) Court. They include lack of resources in general and lack of separation of powers. Other major problems have been poor and ineffective administration by the Bureau of Indian Affairs (BIA) of their judicial services program along with the exercise of governmental immunity in order not to comply with tribal court orders relating to garnishments and subpoenas. This problem also arises with Indian Health Service (IHS), and in both instances, it has the effect of undermining the administration of justice by the tribal court. An article appeared in 1988 in the Billings, Montana Gazette, in which a special senate investigative committee, who looked into allegations that the BIA spends ninety percent (90%) of its budget on administrative costs, found "...mismanagement, gross negligence and clear evidence of criminal wrongdoing," in the administration of government programs that help Indians, see Attachment #1. This article illustrates the only problem that I have with H. R. 1268. Section 101 Subsections (a) (b) and (c) establishes the Office of Tribal Justice Support within the Bureau of Indian Affairs and transfers the functions of its Branch of Judicial Services to the Office of Tribal Justice Support. I vehemently disagree with this. It is imperative that the provisions in the previous Senate Bill S. 1542 be reinstituted to place the Office of Tribal Justice Support outside the BIA, and be composed of tribal judges rather than bureaucrats.

Transferring the functions of the Branch Judicial Services to the Office of Tribal Justice Support is simplistic and ignores reality. This office has no plan to deal with the real problems of



tribal courts. And in testimony before the Select Committee on Indian Affairs of the Senate in 1988, the fact emerged that the Office of Judicial Services had not even asked for any additional funding for tribal courts at a time when statistics indicated an increase in caseloads.

S. 1542 was extremely innovative in dealing with the problems created by lack of separation of powers. A problem that can be traced directly to the BIA's Model Constitutions in implementing the 1934 Indian Reorganization Act, 25 U.S.C. 461 et seq. Placing the Office of Tribal Justice Support outside the BIA and its priority system of funding Tribes diminishes the leverage tribal councils and the BIA can exert over tribal courts. Within the BIA priority system and more than likely outside of it, the Bureau usually will not deal financially any tribal entity except the Tribal Council. In doing this all decisions regarding BIA money for the tribal courts must pass through the Tribal Council to reach the court and then must be approved by the Tribal Council for disbursement. This is exactly where the control exists.

Besides control of Tribal Courts via the purse strings, another problem with BIA administration of Tribal Courts funds can be found on page 42 and 43 of A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS June 1991, see Attachment #2. That is, that Tribal Courts receive only part of the funds earmarked for them. Judge David Harding of the Coeur D'Alene Tribe of Idaho stated at a hearing before the Commission in Portland, Oregon: "Much of the money earmarked for the Courts is lost on the way from Washington to the Tribes, mostly at the BIA Area Office level." Another problem exists when the money reaches the Tribal Councils, it, in turn then decides how the money should be allocated against other priorities. Finally, funding for law enforcement and court operations are often lumped together and as a result, funds are sometimes diverted from court operations to other needs such as police cars or operating jail facilities.

In summary, while Congress is reluctant to impose standards on tribal courts such as separation of powers, it was the BIA who created this problem by opposing the formation of tribal governments without it when implementing the provisions of the 1934 IRA. This has plagued tribal courts more than lack of funding since that time and has never been addressed since. The effects of lack of separation of powers were taken into consideration when S. 1542 was before the last Congress by placing administration and funding outside of the BIA; however H. R. 1268 does nothing more than provide more money to the BIA for continued mismanagement.

While additional resources are welcome, it is extremely discouraging to witness Congressional efforts to enhance tribal courts to be merely to put more money into the BIA. With a poor track record of administering programs for Indian Tribes and a history of mismanagement of money intended to benefit Tribes, the Bureau is a poor risk to solve any kind of tribal court problem. Tribal court Judges have the first hand working knowledge necessary to carry out the proposal of this bill rather than an administrative office of bureaucrats located in Washington, D.C., Therefore the Office of Tribal Justice Support should be composed of tribal court judges.

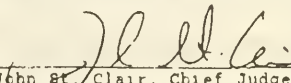
For funding to be out of the control of tribal governments, it has to be outside of the BIA. Its priority system has systematically placed tribal courts near the bottom. There is nothing to guarantee that the BIA will follow direction from Congress, and if history can be believed, it won't. Consequently to fund the BIA is to enhance the BIA. If that is Congress' goal this bill can accomplish that. If Congress wishes to enhance tribal courts, then it must deal with the problems that exist. S. 1542 of the previous Congress accomplished that by placing administration and funding outside the BIA and as a result of out of the control it exerts through tribal governments. This bill needs to be amended to do what S. 1542 did previously. A new method of funding Indian Tribes is nothing to be afraid of. It



just might prove to be a more efficient vehicle than what now exists. No one will know until it is tried. That time I believe has come.

On behalf of the Shoshone and Arapahoe Tribal Court System I want to thank the Committee for this opportunity to testify before you at this hearing and express my support for H. R. 1268.

Signed: \_\_\_\_\_

  
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ATTACHMENT #1

# BIA investigation finds mismanagement, crime

From Gazette News Service

WASHINGTON — A year-long investigation of government programs that help Indians has found "mismanagement, gross negligence and clear evidence of criminal wrongdoing," said a spokesman for the senator heading the probe.

A special Senate investigative committee will begin three weeks of hearings Monday to review those findings, beginning with problems within the Bureau of Indian Affairs and tribal governments.

The committee also will look into allegations that Indian reservations are being infiltrated by organized crime and into recurring problems of child sexual abuse in some Indian schools.

Committee members and staff have refused to provide details about the findings of the investigation, except to say the hearings will be startling.

"The enormous amount of information that has been gathered indicates extremely serious problems," said Robert Maynes, a spokesman for Chairman Dennis DeConcini, D-Ariz.

The committee's charter is to suggest ways to reform Indian programs, but "there is no question that large amounts of information will be turned over to the Justice Department," for criminal prosecution, Maynes added.

The special committee was formed after a series of articles in the Arizona Republic last year charged that the Bureau of Indian

“ There have been reports of the presence of organized crime becoming part of gambling on Indian reservations.

— Tom Daschle  
S.D. senator

Affairs programs are in a shambles. Indian leaders had been making such claims in less detail for years.

The Republic claimed that a bloated BIA bureaucracy spends 90 percent of its \$1 billion budget on administrative costs, cannot account for more than \$250 million in equipment and is in such disarray that it cannot meet most Indian needs.

The newspaper also charged that the BIA had been negligent in allowing oil and gas companies to steal \$5.7 billion from Indian tribes in unpaid fees over the last ten years.

Originally, the committee had intended to focus on oil and gas leases. At least one prominent Indian leader has voiced concern over the committee's decision to broaden the investigation to include corruption within the tribes.

"My first thought was that sooner or later the scoundrels in Congress and the scoundrels in the executive branch would get together and decide that it was all the Indians' fault. I hope that hasn't happened," said Susan Shown Harjo, executive director of the National Congress of American Indians.

"Allegations of Indian connections to organized crime are also an addition to the agenda."

There have been reports of the presence of organized crime becoming part of gambling on Indian reservations. If it's present to the degree we think, it's important to take a look at it," said Sen. Tom Daschle, D-S.D., a member of the committee.

Indian leaders have denied any problem with organized crime within Indian gambling, a booming business of bingo halls and miniature casinos.

In contrast, the problem of sexual abuse within Indian schools in the Southwest has been well documented. There have been several cases of child molestation at isolated BIA-run boarding schools on area reservations.

More than 125 boys have been molested at the schools since 1981, based on known cases. In at least one case, the BIA hired a teacher who had already been convicted of child sexual abuse in another state.

A staff of about two dozen investigators, operating on a budget of less than \$1 million, has conducted investigations in 30 states and has gathered information from about 600 individuals for the committee, according to Maynes.

court operations is often "lumped together."<sup>71</sup> As a result, funds are sometimes diverted from court operations to other needs such as police cars or the improvement or operation of jail facilities.<sup>72</sup>

Two years later, the American Indian Lawyer Training Program complained that a central repository for data on tribal administration of justice was still needed.<sup>73</sup> However, the amount of money provided to tribal courts by the BIA was increasing, a trend it found encouraging, though still "grossly inadequate."<sup>74</sup> Information on tribal court funding which the Department of the Interior provided to the Commission confirms that the funding has been gradually and significantly increased. The figures below are measured in thousands of dollars:

ATTACHMENT # 2		
Fiscal Year	Total Tribal Courts	Estimated Training
1980	\$4,008	
1981	6,659	
1982	7,908	
1983	7,710	
1984	7,828	
1985	8,296	
1986	10,625	
1987	11,186	1,000
1988	11,947	1,000
1989	11,726	1,200
1990	12,192	1,200

These figures include funding for the Central Office and its local agencies. The Department told the Commission that it was unable to provide training costs incurred by its local BIA agencies, and that

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* See also, *Rapid City Hearing*, supra note 50, at 192 (testimony of Judge Lorraine Roseau).

<sup>73</sup> JUSTICE IN INDIAN COUNTRY, supra note 42, at 12.

To date, a national clearinghouse concerning itself with justice in Indian country—a resource center where information concerning all matters of tribal justice could be collected, evaluated and disseminated—has never been established. Questions have been referred to expensive task forces, tribal attorneys, and various organizations and Federal agencies that also lack access to a central resource center.

*Id.*

<sup>74</sup> *Id.* at 46-47.

on or caseload and court budgets. It found that expenditures varied from \$2.98 to \$14.19 per capita and from \$8.30 to \$35.08 per case. Further, the report said that, due to varying levels of tribal support, courts (and law enforcement), funding inequities are far more obvious in reality. To get the same services, some tribes spend none of their own money, while others have to spend a great deal. Those able to spend tribal funds depend on the BIA entirely, but the level of services varies. Since the report, the Bureau has encouraged area and agency offices to base their budgeting on a formula which would lead to some parity in funding. Judging from the reservations visited, it does not appear that the funding which reaches Indian courts is consistent with the formula.<sup>67</sup>

The tribal judges' report goes on to say that although Federal agencies other than the BIA also sometimes provided funds for tribal court operations "it seems that they rarely know what funds being disbursed by the BIA or other agencies".<sup>68</sup>

One tribe surveyed was due for a large increase in funding because the funds for court operations supplied by one agency were inadequate. It was discovered that other agencies were contributing funds to court operations and that the tribe actually had one of the largest court budgets in the country.<sup>69</sup>

Another problem highlighted by the tribal judges was that their courts received only a part of the funds they were supposed to receive: "Much money earmarked for the courts is lost on the way in Washington to the tribes, mostly at the BIA area office level."<sup>70</sup> The money that reaches the tribal government, as a general rule, is provided to the tribal councils, and they, in turn, must decide how the money should be allocated against other priorities. Another complication, according to the report by the tribal judges association, is that funding for law enforcement and

*Id.*, citing BUREAU OF INDIAN AFFAIRS, INDIAN RESERVATION CRIMINAL JUSTICE & FORCE ANALYSIS 1974-75, at 43 (1975). The tribal judges association indicated that only 3 of the 23 tribes surveyed thought that their tribal court budgets were adequate. INDIAN COURTS AND THE FUTURE, supra note 1, at 57, n.2 at 58-57.

<sup>67</sup> *Id.* at 57.

<sup>68</sup> *Id.* at 57. In this regard, the tribal judges' report notes that "although Public Law 93-638 was supposed to reduce the number of BIA employees contracting out positions to the tribes, the number of employees has increased since passage of the Act." *Id.*

# Campo Band of Mission Indians

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April 29, 1993

The Honorable Bill Richardson, Chairman  
Committee on Natural Resources  
Subcommittee on Native American Affairs  
2349 Rayburn House Office Building  
Washington, D.C. 20515

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Barbara Cuero  
Vice-Chairman

Jackie Lelafu  
Secretary

Harry P. Guero, Jr.  
Treasurer

COMMITTEE:

Brian Connolly  
Tonya Largo  
Michael Connolly

Re: H.R. 1268, the "Indian Tribal Justice Act"

Dear Mr. Chairman:

The Campo Band of Mission Indians is a federally-recognized Indian tribal government whose reservation is located in southern California. I am the Chairman, and, on behalf of the Campo Band, I want to comment on the scope of H.R. 1268 as it applies within Public Law 280 states such as California. The Campo Band believes that the bill overlooks totally the enhancement of tribal justice systems within Public Law 280 states which, just like tribal justice systems located elsewhere, are in dire need of adequate funding, technical assistance, and equipment.

As you know, Indian tribes retain broad civil authority over persons and activities within their territories, and, generally, state jurisdiction within Indian country is of a limited nature. Public Law 280 confers on certain states, including California, partial criminal and civil jurisdiction over Indians and Indian country. However, it is incorrect to assume that Public Law 280 strips tribes of all authority. In fact, nothing in Public Law 280 precludes concurrent tribal court authority. Moreover, the language and judicial interpretations except from the delegation of authority to such states regulatory and tax laws, the tribes retain authority in those areas. See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

Two regulatory areas of great import to Indian tribes today are environmental regulation and gaming regulation. As you may know, the Campo Band is developing a commercial solid waste landfill on its reservation. The Band has enacted a Tribal Environmental Policy Act, Solid Waste Management Code, and comprehensive regulations thereunder. This regulatory scheme includes enforcement through a tribal environmental court, and the Band plans to establish a tax court as well. In addition, Congress is relying on tribal forums to adjudicate disputes arising under the Indian Gaming Regulatory Act. Presumably then, there must be some

Chairman Bill Richardson  
April 29, 1993  
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tribal forum in existence to handle these matters, even in Public Law 280 states.

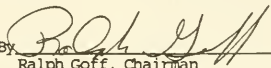
Fairness requires that all tribal justice systems receive the benefits of H.R. 1268. Unfortunately, based on the current practices of the Bureau of Indian Affairs in denying assistance to the justice systems of Indian tribes residing in Public Law 280 states, we do not believe that this will happen without express language from Congress. Accordingly, we urge that H.R. 1268 be amended to give the Bureau of Indian Affairs express direction to assist all federally-recognized Indian tribes with enhancing their justice systems, regardless of whether Public Law 280 is applicable to the state. Such language would allow all tribes to participate fully in the assistance and funding offered by the bill.

In closing, we respectfully request that our comments be included in the legislative hearing record for H.R. 1268. Thank you for your consideration.

With warmest regards.

Sincerely,

CAMPO BAND OF MISSION INDIANS

By   
Ralph Goff, Chairman

JAMES S. GORDON, Chairman  
 BENNY B. BROWN, Vice-Chairman  
 DANIEL L. SANCHEZ, Secretary/Treasurer



# ALL INDIAN PUEBLO COUNCIL

OFFICE OF THE CHAIRMAN

3939 San Pedro, N.E., Suite E • Post Office Box 3258 • Albuquerque, New Mexico 87190 • (505) 881-1992

April 22, 1993

The Honorable Bill Richardson  
 Chairman - Subcommittee on  
 Native American Affairs  
 U.S. House of Representatives  
 1522 Longworth H.O.B.  
 Washington, D.C. 20515

Dear Mr. Chairman:

Please accept this letter as our testimony on H.R.1268.

Our review indicates that H.R.1268 and S.521 are not too different as introduced. Basically, we would continue to support the Judicial Conference as envisioned in last years Senate Bill, however, both H.R. 1268 and S.521 are identical with respect to the Judicial Conference. Our primary concerns are:

(a) Because the real objective is to improve the tribal court system(s) we do not want BIA to arbitrarily take appropriations for its own management purposes; consequently we recommend language in the Bill to restrict BIA from using not more than twenty percent (20%) overall for its administrative purposes. That there be explicit language in the Bill to insure that the BIA Tribal Justice Office as envisioned in this Bill is not going to be swallowed up, by BIA's bureaucracy and subjected to the whims of the bureaucrats.

(b) To insure against (a) above, we recommend that all aspects of programs consistent with tribal court improvement be subject to contracting under authority of P.L. 93-638 as amended.

(c) To insure that all tribal courts receive funding, we recommend base funding for each tribe/court of \$150,000 to \$200,000 each, based in law. Any balance to be distributed on a formula basis. If we leave formula distribution to BIA you can be assured that the small tribes (like Pueblos) would get crumbs.



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April 22, 1993  
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(d) The '92 Bills identified \$50 million for court purposes. We feel this needs to be increased to \$75 million in the H.R. 1268 with \$25 million to be used for construction of court/detention facilities.

(e) We also recommend that the DISCLAIMER language contained in S.521 be placed in H.R. 1268.

We respectfully remind you, Chairman Richardson, of your address to the New Mexico State Legislature where you had sharply criticized the BIA for its inefficiency in dealing with Indians. Its in this spirit we submit this letter of testimony.

Respectfully,

**ALL INDIAN PUEBLO COUNCIL**

*James S. Hena*  
James S. Hena, Chairman

JSH:mc

xc: Senator Daniel Inouye  
Senator Jeff Bingaman  
Senator Pete Domenici  
Congressman Joe Skeen  
Congressman Steve Schiff  
19 Pueblo Governors  
File



April 19, 1993

The Honorable Bill Richardson  
Chairman, Subcommittee on Native  
American Affairs  
Committee on Natural Resources  
United States House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

**Re: H.R. 1268, the Indian Tribal Justice Act**

Dear Chairman Richardson:

This letter represents the official comments of the Confederated Tribes of the Warm Springs Reservation of Oregon concerning H.R. 1268, the Indian Tribal Justice Act. This bill was the subject of a hearing before the Subcommittee on Native American Affairs on April 21, 1993. Although a Warm Springs tribal representative did not testify at the hearing, we respectfully request that the comments contained in this letter be made a part of the hearing record and that our views be considered in developing this legislation.

The Warm Springs Tribal Council supports the enactment of H.R. 1268, with some minor modifications and clarifications. Our support for this legislation is in keeping with the position we took during the last Congress when the House and the Senate took radically different approaches to tribal courts legislation. As you may recall, in the last Congress the House Interior and Insular Affairs Committee reported out a bill, H.R. 4004, that is very similar to H.R. 1268 now before your Subcommittee. In the Senate, however, the Senate Select Committee on Indian Affairs reported out a bill, S. 1752, that would have created a new entity called a "Tribal Judicial Conference" with control over all funding of tribal courts, either directly or through establishing distribution formulas. Under S. 1752, tribal court funding, other than the routine issuance of base support, would be removed from the Bureau of Indian Affairs and appropriations for tribal courts would go through the Appropriations Subcommittee for Commerce, State, Justice and the Judiciary, a subcommittee with no experience in

The Honorable Bill Richardson  
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Indian affairs. We strongly opposed last year's Senate Bill, S. 1752, and strongly supported the House version of tribal court legislation, H.R. 4004. (Attached is our letter of July 13, 1992 to Chairman George Miller of the Committee on Interior and Insular Affairs explaining our position on the House and Senate bills).

We are pleased to support this year's House version of tribal courts legislation, H.R. 1268, primarily because it embodies most of the positive features of H.R. 4004, which we supported last year. We are also very pleased to note a tribal courts bill was introduced recently in the Senate by Senators McCain, Inouye and Campbell, that is very similar to H.R. 1268. In other words, it appears that the Senate has abandoned the unworkable, objectionable and perhaps unconstitutional approach to tribal courts legislation contained in S. 1752 in favor of the flexible, understandable and straight-forward approach to tribal courts legislation contained in the bill now before you, H.R. 1268, and last year's legislation, H.R. 4004.

With those background comments in mind, we would like to address some specific provisions of H.R. 1268. First, we are generally supportive of the approach taken by the legislation to the idea of tribal judicial conferences. The way last year's Senate legislation handled the idea of a tribal judicial conference was its most objectionable feature. However, H.R. 1268 avoids most of the problems of last year's Senate legislation by making any conference a purely voluntary organization that tribes may join or leave as they wish.

We would, however, like to see a definition of "tribal judicial conference." It is unclear whether these are simply inter-tribal coordinating bodies, similar to the Northwest Tribal Court Judges Association, or whether they include inter-tribal judicial systems, such as the Western Washington Inter-Tribal Court System or the various inter-tribal appellate systems that exist in some parts of the country. If the inter-tribal judicial systems are included in the definition of a "tribal judicial conference," there needs to be some way to separate the funding for inter-tribal appellate courts from the base funding for trial courts.

Also, if inter-tribal appellate courts are considered a "tribal judicial conference," then the Section 202 language requiring that all funding for a member tribe's judicial system go through the tribal judicial conference needs to be changed. If a member tribe of an inter-tribal appellate system wishes to fund its trial court through the Office of Tribal Justice Support established by Title I of H.R. 1268, while funding its appellate function through an inter-tribal court system that is considered a "tribal judicial

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conference," it should be able to do so. Section 202 should not force a tribe into an all-or-nothing decision of whether to seek funding through a tribal judicial conference or through the Office of Tribal Justice Support.

We very much support the idea of creating an Office of Tribal Justice Support within the Bureau of Indian Affairs. We think it makes a lot of sense to concentrate expertise within the agency in a single office devoted solely to strengthening and assisting tribal justice systems. Moreover, for all of its faults, the Bureau of Indian Affairs is the only federal agency with extensive experience in carrying out the federal trust responsibility to the tribes and it is also the federal agency with which the tribes are most familiar in terms of structure, functions and contracting procedures. Indeed, a major failing of last year's Senate bill, in our view, was that it largely bypassed the Bureau of Indian Affairs and required that base support formula development and all other-than-base funding of tribal courts go through the new and vaguely described National Tribal Judicial Conference. Unlike the National Tribal Judicial Conference, we are familiar with the BIA and believe that we can make the new Office of Tribal Justice Support work in a way that genuinely benefits all tribes and helps the tribes improve their judicial systems.

With respect to the levels of funding authorized in Title III of H.R. 1268, we believe that these funding levels are appropriate. We are especially supportive of the idea of separating the base funding for tribal courts from the Indian Priority System. This would have the effect of stabilizing court operations by taking the uncertainty out of tribal court funding. Further, we believe that the plan for developing a formula for distribution of base support funding for tribal justice systems set out in Section 103 is the only reasonable way to approach the difficult issue of allocation of funding. While there are certain to be disagreements about development of the formula, we believe that the factors listed in Section 103(c)(3) are the appropriate ones and the assurances in Section 103(c)(4) that the Secretary will ensure an equitable distribution of funds provide the necessary safeguards. Once again, because the funding is provided through the BIA, the tribes are familiar with the procedures and remedies for challenging agency action they believe is inequitable. This would not be the case with a new entity created outside of the BIA, such as the National Tribal Judicial Conference in last year's Senate Bill.

In summary, the Warm Springs Tribal Council believes that H.R. 1268 takes the right approach to the difficult and urgent problem of providing federal assistance to strengthen tribal judicial systems.

The Honorable Bill Richardson  
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You are fully aware, we are sure, of the critical importance of tribal courts in the implementation and protection of tribal sovereignty. You are also well aware of the severe difficulties most tribal courts face in carrying out these vital responsibilities because of meager tribal resources and inadequate assistance from the federal government. This is an area where the federal government simply must act to carry out its trust responsibility to the tribes. The approach taken by H.R. 1268 is, in our view, the right approach to this problem and, with the small changes we have suggested, we wholeheartedly support enactment of this legislation.

Thank you.

Sincerely,



RAYMOND CALICA, SR., Chairman  
Warm Springs Tribal Council

richard: B: HgaB

cc: Oregon Tribes  
Mark Phillips  
Howard G. Arnett

## PUEBLO OF ZUNI

P. O. BOX 339  
ZUNI, NEW MEXICO 87327

ROBERT E. LEWIS  
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PESANCIO LASILOO  
Lt. Governor  
JOSEPH DISHTA  
HB. Councilman  
VAL R. PANTEAH SR.  
Councilman

EDISON R. WATO, SR.  
Councilman  
AUGUSTINE A. PANTEAH  
Councilman  
CHARLOTTE T. BRADLEY  
Councilwoman  
OWEN R. BOSELL  
Councilman



505-782-4481

April 26, 1993

In reply refer to:

The Honorable Bill Richardson  
Chairman  
Subcommittee on Native American Affairs  
House Committee on Natural Resources  
1522 Longworth House Office Building  
Washington, D.C. 20515

Dear Chairman Richardson:

The Zuni Tribe hereby submits the following comments concerning H.R. 1268, the proposed Indian Tribal Justice Act which you introduced on March 9, 1993.

Before making specific comments on various provisions in this proposal, we wish to make it clear that while we support the establishment of an Office of Tribal Justice Support within the Bureau of Indian Affairs as a means of further funding certain training and technical assistance to tribes, we also support the continuation of traditional tribal judicial practices.

In particular, we urge you and your colleagues to allow tribes which wish to do so to continue their practices of handling land matters at the tribal council level where such issues as land division in the case of death of an elder can be resolved according to time-honored traditions.

Section 1. We suggest that this proposal be call the "Indian Tribal Justice Act of 1993."

Section 2. We suggest the addition of the following finding:

"(7) traditional tribal judicial practices are essential to the maintenance of the culture and identity of tribes as well as the goals of this Act and therefore should be allowed to continue."



Honorable Bill Richardson  
 April 26, 1993  
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The addition of this finding would clarify the intent of Congress to foster traditional tribal judicial practices as well as the more recently created tribal justice systems.

Section 3. We suggest the definition of the term "judicial personnel" be amended to include any "tribal council member" whether or not that individual is an official within the tribal justice system.

This amendment of this definition would allow those tribal council members who engage in traditional judicial practices to be covered by the provisions of this proposal even though they may not be members of the judicial branch of a tribe.

Section 101. We suggest that the following sentence be added to the end of subparagraph (b):

"The Office of Tribal Justice Support shall be directed by a member of the Bar who shall have had at least two years of experience employed as an attorney within a tribal justice system."

This amendment would ensure that the Office of Tribal Justice Support would be directed by an individual having some experience with the many issues which will be handled by the office.

We suggest the following subparagraphs be added to subparagraph (c):

"(7) Provide funds to Indian tribes and tribal organizations for the continuation and enhancement of traditional tribal judicial practices."

This amendment would ensure that the functions of the Office include providing funding for traditional tribal judicial practices as well as the many other functions provided for in this proposed legislation.

Section 102. We suggest that in subparagraph (a) the word "conduct" be deleted and in lieu therefore the word "complete" be inserted.

This amendment would ensure that a survey of conditions of tribal justice system and Courts of Indian Offenses would be completed not later than one year after the date of the enactment of this legislative proposal.

Honorable Bill Richardson  
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Section 103. We suggest subparagraph (a) be amended as follows:

After the phrase "tribal justice systems" insert "and traditional tribal judicial practices".

This amendment is intended to emphasize that many tribes conduct traditional judicial practices which may not fall within the definition of tribal justice system which may be employed by the Bureau of Indian Affairs.

We suggest subparagraph (b)(9)(E) be amended to read as follows:

"(E) traditional tribal judicial practices, traditional tribal justice systems and traditional methods of dispute resolution."

This amendment is intended to emphasize the same point as is made in the preceding amendment.

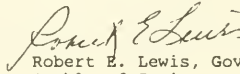
We suggest subparagraph (c)(2) be amended by adding the following after the phrase "American Bar Association":

"and appropriate State bar associations."

This amendment is intended to ensure that case load standards and staffing requirements developed by appropriate State bar associations are taken into consideration by the Secretary.

Mr. Chairman, you are to be commended for your concern and interest in the justice systems of our tribes. H.R. 1268 will be a major step forward in our government-to-government relationship if it is ever enacted into law. The Zuni Tribe pledges its support to you and your Congressional colleagues in achieving that goal.

Sincerely,

  
Robert E. Lewis, Governor  
Pueblo of Zuni

cc: Honorable Jeff Bingaman  
Honorable Pete V. Domenici  
Honorable Ben Nighthorse Campbell  
Honorable Daniel K. Inouye  
Honorable John McCain



## HUALAPAI TRIBAL COUNCIL

P.O. BOX 170 • PEACH SPRINGS, ARIZONA 86434 • 602 769-2216  
30 April 1993

The Great Spirit created Man and Woman in his own image. In doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other. In doing so, happiness and contentment was achieved then, as it should be now.

The connecting of the Hair makes them one person. For happiness or contentment can not be achieved without each other.

The Canyons are represented by the purples in the middle ground, where the people were created. These canyons are Sacred, and should be so treated at all times.

The Reservation is pictured to represent the land that is ours. Treat it well.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us.

The Sun is the symbol of life, without it nothing is possible -- the plants don't grow -- there will be no life -- nothing. The Sun also represents the dawn of the Hualapai people. Through hard work, determination and education, everything is possible and we are assured bigger and brighter days ahead.

The Tracks in the middle represent the coyote and other animals which were here before us.

The Green around the symbol are pine trees, representing our name Hualapai -- PEOPLE OF THE TALL PINES --

Chairman Bill Richardson  
House Subcommittee on Native American Affairs  
1522 Longworth H.O.B.  
Washington, D.C. 20515

Dear Chairman Richardson:

On behalf of the Hualapai Tribe, we would like to make you aware of our position on the pending bill before the house, H.R. 1268. This bill comes before us rather surprisingly given the type of bills which appeared before the Senate and House last year, H.R. 4004 and S. 1752. Please be aware that our overriding concern with respect to Tribal Court legislation at this time is the question of funding. We do want to see funding come to our Tribal Court with as little administrative cost being assessed as possible by the Bureau of Indian Affairs. We are hesitant to support these bills currently before Congress so long as they offer to expand the services provided by the Bureau of Indian Affairs. In addition, we are in agreement with statements which were made in the hearings during the week of April 19 to 23, that language pertaining to the formation of Judicial Conferences may be unnecessary or perhaps premature. Accordingly, we would like to express our support for H.R. 1268 (S. 521) only if there is a clear limitation of funding to the Bureau of Indian Affairs for the additional duties placed upon the Bureau, and an exclusion of any references to Judicial Conferences. If none of these can be accomplished within the present bill, we must then express our opposition.

We believe that our position may reflect the concerns of other tribes and ask you to earnestly consider our request.

Sincerely,

HUALAPAI TRIBAL COUNCIL

*Delbert Havatone*  
Delbert Havatone, tribal Chairman

# Fort Belnap Community Court

Chief Judge  
Cranston Hawley



(406)353-2205/Ext. 464  
Route 1 Box 62  
Fort Belnap Agency  
Harlem, Montana 59526

May 6, 1993

Honorable Chairman Bill Richardson  
House Subcommittee on Native Affairs  
1523 Longworth H.O.B.  
Washington, D.C. 20515

Re: HR 1268

Honorable Bill Richardson:

With regards to the above, I submit these comments as the Chief Judge of the Fort Belnap Indian Community Tribal Court.

As it now reads, HR 1268 contains four major issues in one bill: the issue of funding; distribution of funding; the creation of the Office of Tribal Justice Support (OJS); and the creation of a Federally recognized Judicial Conference.

Please be aware that our overriding concern with respect to Tribal Court legislation at this time is one of funding. Our current facility poses a health and safety hazard and is on the verge of being condemned, and our staffing is inadequate to meet the judicial needs of the community.

I am in full agreement with statements made during the April 20 hearing that any language pertaining to the formation of judicial conference may be unnecessary. This issue should be addressed independently of the HR 1268. This would allow further discussion and more tribal input on the issue, complying with the principle of self-determination.

In order to maximize the funding channeled to the tribes, we feel it necessary that the Bureau of Indian Affairs be allowed to assess as little administrative costs as possible. The creation of an office of Tribal Justice Support can happen internally within the Bureau of Indian Affairs without the necessity of federal legislation. There should not be an expansion of the duties of the Bureau of Indian Affairs.

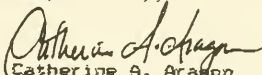
Again, there is a dire need for funding which has been uncontroverted in the entire Congressional record dating back to the American Indian Policy Review Commission Report of 1977. This need should be addressed immediately.

Additionally, our support of HR 1268 is contingent upon the exclusion of reference to Judicial Conferences and a limitation on the duties of and additional funding to the Bureau of Indian Affairs.

We believe that our position may reflect the concerns of other Indian Tribes and Nations and ask that you earnestly consider our request.

Please contact me if further comments are needed.

Respectfully,



Catherine A. Aragon  
Chief Judge  
Fort Belknap Community Court

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